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UNITED STATES SUPREME COURT
1928-1929

A Review of the Work of
The Supreme Court of the United States
For October Term, 1928

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BY

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LEGAL RESEARCH SERVICE
Washington, D. C.
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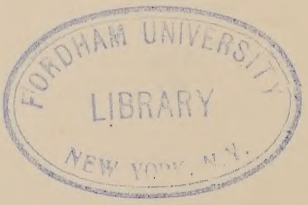

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PREFACE

Although the decisions of the Supreme Court deal with questions of law, they reflect the outstanding economic, political and social problems of the nation. Questions concerning the valuations of railroads or other public utilities, rights and privileges granted by legislatures to stimulate or protect cooperative enterprises, the criminal and civil liability of bank directors, the regulation of insurance companies, the prevention of monopolies and unfair competition, the liability of railroads or steamship companies for injuries to their employees, are all essentially economic problems. The extent of the Senate's power of investigation and of the executive and judicial veto in overriding legislation are problems of political science. Restrictive covenants on the resale of real estate to negroes may be brought to the Supreme Court as a question of contract, or the exclusion of negroes from juries may appear as a technical question in criminal procedure, but such problems reflect the relations of racial groups in the country and are important problems of sociology. In short, there is hardly an important national problem which is not represented in the cases before the Supreme Court, or which is not affected by the Court's decisions. A study of such social problems, without a knowledge of their legal aspects, as reflected in the decisions of the highest court of the land, is incomplete.

In view of this great influence of the Court and its far reaching powers, the Legal Research Service

instituted a system for giving to the members of the bar and to the general public current information on the decisions of the Supreme Court.

For the members of the bar, who are interested in federal legal questions, the Legal Research Service publishes the *U. S. Supreme Court Service.* This is a loose-leaf service which gives current information on all the cases in the Court, from the time they are filed until they are finally decided.

For the general public, the Legal Research Service instituted a system of reporting the decisions of the Supreme Court in newspapers and class publications. Newspapers publish reports on cases of general public interest, while the class publications usually limit themselves to reports on decisions of interest to their respective fields. Thus marine publications report admiralty decisions, insurance publications carry reports on insurance questions, labor publications report those cases which affect their interests, etc. The main object of this "news service" is to report the cases *accurately* and in as simple a style as the subject matter permits. To this end, the cases in the Court are studied by persons trained in the law, and special care is taken to write the reports briefly and free from technical or otherwise difficult phraseology, consistently, however, with the principles of *adequacy* and *accuracy.*

The cases disposed of by the Court are so numerous, however, that space limitations will not permit any one publication to report all the decisions. A method has therefore been adopted whereby editors

are informed of all the pending cases, before the decisions are rendered. By this method, editors are enabled to select in advance those cases which are of special importance to their respective publications.

Isolated reports on the cases themselves, however, give but fragmentary information on the work of the Court, as a whole. In the course of a term, the Court disposes of a large number of cases in many important branches of law, such as public utilities, taxation, insurance, banking, etc. To give the public a general idea concerning the decisions in each of the important economic or social fields, the Legal Research Service has published reviews on the work of the Court covering the entire term. These reviews have appeared in the form of weekly articles published during the summer months, after the close of the Court's term.

The reviews of the decisions in the newspapers and class publications still fall short of giving the public an organized view of the entire work of the Court. It has been suggested that these reviews be published in a more systematic and permanent form. The Legal Research Service therefore adopted the plan of issuing annual reviews on the work of the Supreme Court. This is the first of such proposed annual reviews.

In writing the book, the authors have experienced an insurmountable difficulty in the classification of the cases treated herein. The object has been to adopt a classification which would yield a continuous discussion. This could be accomplished only in part, with the result that there is a lack of continuity

in some portions and considerable repetition in others.

The lack of continuity between the chapters and even within the chapters themselves was unavoidable, for the amount of continuity must depend on the nature of the cases which come before the Court during the term under consideration. Although it might have been possible to make the treatment more continuous by supplying discussion from the previous decisions of the Court, or from the general field of law, such study would have been beyond the scope or purpose of the present volume.

Neither are the classes, into which the cases have been divided, mutually exclusive. A case may present an important problem in banking, but also one in criminal law, and in addition may involve the validity of a statute. Under such circumstances, it is necessary to treat such cases in connection with all these general subjects. In a number of instances, the authors have chosen to repeat statements concerning such cases, rather than to incorporate them by reference, in order to avoid rendering the reading burdensome.

Nor does this work purport to cover all the cases considered by the Supreme Court during the past term. The book is intended for laymen, as well as for the legal profession, and therefore the authors have eliminated from discussion such technical branches of the law as procedure, admiralty, bankruptcy, patents, etc., except in so far as such cases may be part of a subject which is of general public interest.

Portions of the following chapters have appeared during the summer of 1929 in the *Boston Transcript*, the *Wall Street Journal*, the *Washington Evening Star*, the *Newark Evening News*, *The Daily Record* of Baltimore, the *Legal Intelligencer of Philadelphia*, the *Pittsburgh Legal Journal*, "*Labor*," the *Nautical Gazette*, *Editorial Research Reports*, in a number of publications issued by the Railroad Brotherhoods and in other newspapers and class publications.

We wish to express our gratitude to the Chief Justice of the United States, who has made available to us the Court's facilities necessary for carrying on the work of the Legal Research Service. To Chief Justice Taft and Justices Brandeis, Butler and Stone we are also indebted for their interest which has been a constant source of inspiration and encouragement.

We also wish to express our thanks to Mr. Charles Elmore Cropley, Clerk of the Supreme Court, and to his staff, for their splendid cooperation in furnishing us copies of the briefs, records and opinions as soon as these are filed, which greatly facilitates our work.

Mr. Frank T. Wallace and Mr. Gilbert S. Powell of *The Daily Record Co.* of Baltimore have taken a personal interest in the printing of this volume, for which we are greatly obliged to them.

GREGORY HANKIN.
CHARLOTTE A. HANKIN.

Washington, D. C.
October, 1929.

CITATIONS

Since at the time of writing this book, the final volumes of the U. S. Reports of the Supreme Court Reporter or of the Lawyers' Edition for October Term, 1928, had not yet been issued, the cases treated herein are cited by docket number, title and date of decision. All the cases disposed of by the Supreme Court during the 1928 Term will be found in Vols. 278 and 279 of the U. S. Reports, in Vol. 49 of the Supreme Court Reporter, and in Volume 73 of the Lawyers' Edition.

The great majority of the cases considered by the Court were disposed of without opinions. For a ready reference to the questions involved in all the cases docketed during the term, as well as the orders or opinions of the Court in the disposition of the cases, the reader is referred to the *U. S. Supreme Court Service,* published by the Legal Research Service.

The numbers preceding the titles of the cases, refer to the Supreme Court Docket for October Term, 1928. Where cases of the 1929 Term are cited, the docket number is followed by a reference to October Term, 1929. The cases decided by the Court before the 1928 Term are given their citations in the official reports.

I

INTRODUCTION

Problems in the Efficient Administration of Justice

Much public interest has been evoked, within recent years, by the efforts of the Supreme Court to catch up with its work. At the close of 1921 Term, marking the close of Chief Justice Taft's first term, the Court was 437 cases in arrears. At the close of the next term, the number of cases dropped to 392, but a year later it rose to 462 and then to 558 in the following year. During this period, a case was in the Supreme Court for years before argument could be reached.

In 1925, Congress passed the Jurisdictional Act[1] which not only enabled the Court to dispose of the large numbers of cases filed every year, but also to reduce the number of cases in which it was in arrears. The comparative progress which the Court made in the past eight years since the Chief Justice took office, may be seen from the following table:

[1] Act of Feb. 13, 1925. 43 Stat. 936.

DISPOSITION OF CASES BY THE SUPREME COURT

NUMBER OF CASES

Term	Pending At Beginning of Term	Docketed During Term	Decided	Carried Over
1922-3	437	720	765	392
1923-4	392	731	661	462
1924-5	462	854	761	558
	Effective Date of Act.			
1925-6	558	754	858	465
1926-7	465	732	888	295
1927-8	295	754	859	190
1928-9	190	778	825	143

Since the enactment of the Jurisdictional Act, the Court has made great strides in clearing its docket. The greatest advance was made during the past term which ended on Monday, June 3, 1929. The Court disposed of 825 out of the 968 cases docketed during the term, leaving only 143 cases to be carried over for the next term.

For all practical purposes it may be said the Court has caught up with its work. It has disposed of all the cases it could have acted upon, in view of the rules allowing counsel time within which to file their briefs. Of over 700 petitions filed during the term, all those submitted within a week from the closing of the term were disposed of. This left only 41 petitions which the Court had no opportunity to consider.

In fact, so rapid has been the Court's pace, that its efficiency has become a source of embarrassment

to counsel in the preparation of their cases.[2] This was pointed out by Chief Justice Taft in addressing the 1929 session of the American Law Institute.[3] He said:

> "I can say with respect to the business of the Court that under the beneficent Act of February 13, 1925, we have made such progress with the business of the Court, that I think members of the bar are beginning to be a little embarrassed by the proximity of the Court to them."

Theory of the Jurisdictional Act

Under this Jurisdictional Act, which was passed through the efforts of the Chief Justice, Congress limited the types of cases which may come to the Supreme Court as a matter of right. Most of the cases coming to the Court must come under a preliminary application to review the decisions of the lower Courts. The first class of cases is generally known as the cases on appeal. The others are designated as the cases coming on a writ of certiorari.

The enactment of this Jurisdictional Act was based on the theory that after a trial in a federal district court and an appeal in the Circuit Court of

[2] In his book on the Supreme Court of the United States, Mr. Charles Evans Hughes, referring to the efficiency of the Court during the 1927 Term, states that only twelve to fifteen months elapsed between the filing of a case and the hearing of the arguments. During the past term, the average time which elapsed between the filing of the last ten cases and their arguments was about four and a half months.

[3] Proceedings of the American Law Institute, 1929.

Appeals, the parties have had their day in court, and the judgment should be final; likewise with cases which have gone through the entire hierarchy of state courts. The Supreme Court should then in its discretion limit its review to those cases which involve matters of public importance.

Appeals

A case may come on appeal from the decision of the highest court of a state, if the constitutionality of a state statute is in question, and that court has ruled that the statute is not repugnant to the federal Constitution. These cases constitute the largest class of appeals. An appeal may also be taken from the decision of a state court, if the constitutionality of a federal law is in question, and the state court has held the law unconstitutional. The case in which the Supreme Judicial Court of Massachusetts limited the provision in the McFadden Banking Act, permitting consolidated national banks to act as executors, is an example of this class of appeals considered by the Supreme Court during the past term.[4]

Likewise, where the United States Circuit Court of Appeals holds a state statute invalid, the case may come to the Supreme Court on appeal. An illustration of this class of appeals, during the past term, is the case in which the Circuit Court of Appeals held the Corporation Franchise Tax of New

[4] No. 469—*Ex Parte: Worcester County National Bank*, May 13, 1929.

York unconstitutional, as applied to foreign corporations having non-par value stock.[5] The state of New York appealed the case to the Supreme Court.

Under the Judicial Code, appeals may also be taken directly to the Supreme Court from the decisions of the federal district courts. These are the cases in which the petitioner seeks to enjoin the enforcement of a state statute or an order of a state or federal Commission, in which cases the petition for a preliminary injunction must have been heard by three judges, at least one of whom must be a Circuit Court judge or a justice of the Supreme Court. This is a growing class of appeals, and during the past term fifty-six such appeals were brought to the Supreme Court. An outstanding example of the cases in which orders of state commissions were sought to be set aside was the New York Five Cent Fare Case.[6] The invalidity of an order of a federal commission was involved in the appeal of the St. Louis and O'Fallon Railway Company, in the Railroad Valuation Case.[7]

The Judicial Code also provides for appeals from the district courts to the Supreme Court in certain anti-trust cases and (where the Government is the appellant) in criminal cases. The California Co-

[5] No. 601—*New York v. Gamble Latrobe, Jr., et al.*, May 13, 1929.

[6] No. 159—*John F. Gilchrist, et al. v. Interborough Rapid Transit Co. et al.*, April 8, 1929.

[7] No. 131—*St. Louis & O'Fallon Railway Co. v. U. S., et al.*, May 20, 1929. See p. 15, infra.

operative Canneries sought to intervene in the Packers Case and moved to have the Packers Consent Decree set aside or modified. The Supreme Court of the District of Columbia denied the motion, and the Canneries appealed to the Court of Appeals of the District. The Supreme Court held, however, that in equity suits under the anti-trust laws, an appeal lies only to the Supreme Court of the United States.[8]

An appeal from the district court in a criminal case came to the Supreme Court before the close of the past term. This was the case in which the Government prosecuted former Congressman Wurzbach of Texas for having accepted campaign contributions from federal employees, contrary to law.[9] The district court held, on the authority of the Newberry Case[10] that the indictment charged no offense against the United States, because the campaign contributions in question were received for the primary elections, and that these did not constitute a "federal purpose."

Writs of Certiorari

All other cases brought by the litigants[11] to the Supreme Court are reviewable by the Court in its discretion.

8 No. 375—*United States v. California Cooperative Canneries*, May 20, 1929.

9 No. 845—*United States v. Wurzbach* (case still pending).

10 *Newberry v. United States*, 256 U. S. 232.

11 There is a third class of cases brought to the Supreme Court not by the litigants, but by the lower federal courts. Under the

The Court in its rules [12] designated the general classes of cases which it will review: (1) Where there is conflict among the various circuits on the same subject-matter. (2) Where a state court has decided a federal question, not theretofore determined, or in a way probably not in accord with the decisions of the Supreme Court. (3) Where a Circuit Court of Appeals decided a local question in conflict with local decisions, or a general question in conflict with the weight of authority or the decisions of the Supreme Court. (4) Where the lower federal court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's power of supervision.

Six Out of Seven Petitions Denied

These, in the main, are the classes of cases in which the Court will grant a writ of certiorari. It is apparent, however, that the members of the bar and the Court are not yet in accord as to the applications of those rules. During the past term there were 680 petitions submitted. Of these 95 were

Judicial Code the Circuit Court of Appeals, the Court of Claims and the Court of Appeals of the District of Columbia may certify questions to the Supreme Court. These are known as cases on certificate. The appeals, the certiorari cases and the cases on certificate constitute the appellate docket of the Supreme Court. Under Art. III, Sec. 2, the Supreme Court also acts as a court of original jurisdiction in "all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party." This class of cases constitutes the original docket.

[12] Rule 38, Revised Rules of Supreme Court of the United States, effective July 1, 1928.

granted,—less than one out of seven. Had the Court granted six out of seven petitions, it might have been said that there is a fair difference of opinion. The present situation leads to the conclusion that there is clearly a misunderstanding between the Bar and the Bench as to the types of cases which should come to the Supreme Court.

Likewise, in the cases which come to the Court on appeal, it is apparent that the members of the bar have not fully appreciated the objects of the Jurisdictional Act. The Court, on many occasions, was obliged to stop counsel in the midst of their arguments, and dismiss the appeals for lack of jurisdiction. Such cases have taxed the time of the Court, and therefore beginning with this term, the Court adopted a rule [13] that in all cases on appeal, the appellant must file a preliminary statement showing that the case is properly before the Court. This, in effect, subjects the appeals to the same preliminary review as the cases on certiorari. During this term the Court, on preliminary examination, found that in 51 cases probable jurisdiction had been shown. It dismissed 59 appeals for lack of jurisdiction, either because the cases presented no substantial federal question, or because the judgment of the lower court was not final, or because the judgment of the lower court was based on a non-federal ground sufficient to support the decision.

[13] Rule 12, Revised Rules of Supreme Court of the United States, effective July 1, 1928.

From this it may be seen that much of the Court's time is consumed in sifting out the cases which it will consider on the merits. Of the 825 cases disposed of, only 274 cases were decided on the merits, and only 126 opinions were delivered.

Court Faces New Problems

Now that the Supreme Court has caught up with its docket, its next problem will undoubtedly be to diminish the number of cases which should not come before it. Thus far there has been no diminution in the number of cases. During the year 1924-5 the number of cases docketed jumped to 854, from 731 docketed during the preceding term. The probable reason for this is that, though the Jurisdictional Act had been enacted it had not yet become effective, and attorneys desired to gain an advantage by getting their cases in under the old law. Since then the cases docketed during any one term have been in the vicinity of 730 to 780. This is by far a larger number of cases than any one court can handle adequately.

What methods the Court will adopt to accomplish this end is not known.

Last term, the Court penalized two appellants in the sums of $150 and $200 respectively for bringing cases in which the Court held the questions were so frivolous and so lacking in substance that the proceedings merely wasted the time of the Court and of the opposing sides. One of them questioned the constitutionality of the Kansas statute extending the

state's power of eminent domain to lands possessing historical interest.[14] The other case involved a contest under a will and a question of the jurisdiction of the lower federal court in a suit against a state.[15]

Perhaps it was harsh to penalize the appellants for the mistakes of their counsel. Usually clients do not exercise much control over the details in the proceedings taken by their attorneys, and if they did, this would probably only hinder rather than help the situation. Furthermore, these penalties came somewhat too late, for by that time the Court had already instituted the rule that in every case coming on appeal, a preliminary jurisdictional statement must be filed, and these statements enable the Court to dispose of such cases without the necessity of hearing the oral arguments. Furthermore, this method of discouraging the Bar from bringing unmeritorious cases can hardly be applied to the great bulk of cases brought to the Supreme Court on preliminary applications to review the decisions of the lower courts. It would be incongruous to penalize an aggrieved petitioner for asking the Supreme Court, in its discretion, to correct those rulings.

Much of the difficulty is undoubtedly due to lack of knowledge on part of the members of the Bar concerning the cases which are now coming to the Supreme Court. Each attorney, of course, sees great importance in his own particular case, but he does

[14] No. 63—*Katherine C. Roe v. Kansas ex rel William A. Smith et al.*, Jan. 2, 1929.

[15] No. 61—*John Slaker, Administrator v. Charles O'Connor*, Jan. 2, 1929.

not view his case in the light of the hundreds of other cases pending before the Supreme Court at the same time. In the main, the solution lies in a better acquaintance on the part of the Bar with the work of the Supreme Court.

Court's Procedure Partly Responsible

In part, the difficulty lies with the procedure in the Court itself. The Bar has been encouraged by the Court not to attribute much importance to denials of petitions for certiorari. The Court assigns no reasons in disposing of such cases. When a petition is denied, it may be assumed that the Court sees no error in the decision of the lower court. On the other hand, if the case comes from a state court the reason for the denial of a petition may be that the case presents no substantial federal question, or that the decision may be based on a non-federal ground, or that the judgment is not final. If the case comes from the Circuit Court of Appeals, the reason for the denial of the petition may be that there is really no conflict among the decisions of the various circuits, or that the decision on a local question is not in conflict with local authority, or that the case does not present a question of general law not yet passed on by the Supreme Court. From whatever court the case may come, the reason for the denial of the writ of certiorari may be that substantial justice has been done by the lower courts, or that the case presents no problem of sufficient public importance. The members of the Bar are not

informed of the Court's reasons for their future guidance.

Coupled with the above, is the feeling on part of counsel, perhaps unfounded, that "public importance" is a relative term, and that the judges are influenced in their decisions by the relative merits of the petitions before them at the particular time. All these considerations create a hope that perhaps the Court might grant a review in the particular case.

Were the members of the Bar apprised of the reason for the Court's action, the number of the petitions would undoubtedly diminish. In some jurisdictions, where cases may be brought to the Supreme Court of the State from the appellate court on a petition for a writ of certiorari, the denial of the petition without assigning reasons, is tantamount to an affirmance of the judgment of the lower court. If some such rule were adopted by the Supreme Court, it would serve as a reason for denial of petitions in a great number of cases.

Many petitions could be rejected with the reasons stated in few words. Most of the petitions would probably be rejected for "lack of a substantial federal question." This phrase, however, may have to be supplemented by an opinion from time to time. During the 1927 Term, when the Supreme Court decided the case in which 156 insurance companies sought to enjoin the rate making order of the Superintendent of Insurance of Missouri,[16] the Court,

[16] *Aetna Insurance Co., et al. v. Superintendent of Insurance of Missouri,* 275 U. S. 440.

in an elaborate opinion, dismissed the case for lack of a substantial federal question. The opinion was a real contribution to the body of constitutional law. In the past term, among the cases dismissed for this reason, was one [17] involving the question whether a state's power of eminent domain is limited by the equal protection clause of the Federal Constitution, or whether it is limited only by the requirements that the property be taken for public use and that just compensation be paid to the owner of the property. That term, also, in the case involving the constitutionality of the Ohio Railroad Consolidation Law [18] and its conflict with the consolidation provisions of the Transportation Act, the Court at first ordered the case dismissed for lack of a substantial federal question. Later, the Court revoked this order, and affirmed the judgment of the Supreme Court of Ohio. Such orders are likely to cause confusion in the minds of counsel as to what constitutes a substantial federal question.[19]

With the great quantity of cases not diminishing, the Court is thus confronted with a dilemma. In order to reduce the work to an amount which a court can humanly handle, the number of cases must be

[17] No. 504—*People of the State of New York ex rel. Horton v. Prendergast*, Jan. 7, 1929.

[18] No. 82—*J. Royal Snyder v. New York, Chicago & St. Louis Railroad Co.*, Dec. 3, 1928; Jan. 2, 1929.

[19] For all cases in which the Supreme Court held that jurisdiction was lacking for want of a substantial federal question, see *U. S. Supreme Court Service*, October Term, 1928. Subject Index, page XXIV.

reduced. But to reduce the number of cases, the Court will probably be forced to take on additional work in correlating the great mass of cases in which it declines to take jurisdiction.

And yet, the Supreme Court requires all the time at its disposal, and more, for the consideration of the many cases, which are properly before it. These cases present difficult questions of law as well as most complicated problems ranging through our entire social structure. Among the 825 cases disposed of by the Court, during the period under consideration, there appeared important problems relating to the great units of our economic system, such as, the railroads and other public utilities, banks and insurance companies. The problems of federal and state taxation were represented in numerous cases. The Court had occasion to consider significant questions arising under the anti-trust acts as applied to regulation of commerce and to the settlement of labor disputes. Labor problems of a serious nature also came under the Federal Employers' Liability Act and the Jones Seamen's Act. Many decisions related to criminal cases, whose large number has become a "problem" in the Supreme Court as well as in the lower courts. Finally, the Court rendered noteworthy decisions in cases having a political character and in cases which reflect our relations to foreign nations and to racial groups. These decisions of the Court will be treated in the subsequent chapters.

II

RAILROAD PROBLEMS

The Railroad Valuation Case was the outstanding of the many important railroad problems considered by the Supreme Court during the past term.[1] Although this case is regarded as the test case questioning the validity of the Interstate Commerce Commission's theory of valuation, this was not the first case which came to the Supreme Court on that question.[2] In the previous cases, however, the Supreme Court held that valuation orders were not subject to judicial review, so long as they did not direct the railroads to do or to refrain from doing, some particular thing. In the St. Louis & O'Fallon Railway Case, the validity of the Commission's valuation came up in connection with a recapture order.

Policy of Recapture

In the Transportation Act of 1920,[3] Congress embarked on a new policy of equalizing transportation rates throughout the country and of establishing the

[1] A comparatively small number of the important railroad cases can be discussed in this volume. For analyses of all the railroad cases considered by the Supreme Court during the past term, see *U. S. Supreme Court Service*, Oct. Term, 1928, Subject Index, pp. XLVII-L.

[2] No. 131—*St. Louis & O'Fallon Railway Co. v. U. S. et al.*, May 20, 1929. Compare with *U. S. v. Los Angeles & Salt Lake R. R.*, 273 U. S. 299.

[3] Act of Feb. 28, 1920, 41 Stat. 456 et seq.

railroad systems on a firm financial basis. This policy may be summarized in the following threefold object: (1) To prescribe a basis of return which would give assurance to investors. (2) To make the return fairly certain and to secure for the public a lower capital charge than would otherwise be necessary. (3) To require those carriers, which under a given body of rates would earn more than a fair return, to pay one half of their excess earnings to the Government (so that this fund might be used to aid the weaker carriers and thus help to maintain the general system of transportation), and to retain the remainder of the excess earnings as a reserve fund to be used only for specific purposes as prescribed in the Transportation Act.

To carry this policy into effect, Congress authorized the Interstate Commerce Commission to make a valuation of the properties of the railroads, or groups of railroads throughout the country, and to establish fair and reasonable rates on the basis of the aggregate values. The Act declared that six per cent shall be a fair return on the investments in the roads and provided that if a railroad earns more than six per cent on its investment, then one half of the excess earnings shall be kept as a reserve fund and the remainder shall be turned over to the Commission for a general contingent fund.

The Act also provided that the periods of recapture shall begin on March 1, 1920, and that the Commission, in determining the values of the railroads

for the purpose of recapture, "shall give due consideration to all elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes."

The Transportation Act also directed that where the Commission found that a group of roads is operated under a common management and control and is operated as a single system, then the value of the properties shall be computed for the system as a whole, irrespective of the separate ownership and accounting returns of the various roads constituting the group.

The Commission made a valuation of the St. Louis & O'Fallon Railway Company's properties for the periods between March 1, 1920, and December 31, 1923, and found that the earnings had exceeded six per cent. It therefore ordered the company to impound one half of the excess earnings as a reserve, and turn over the remainder to the Commission with interest. The Commission also found that the Manufacturers' Railway Company, an affiliated corporation, had had no excess profits during that period, and therefore issued no recapture order with reference to it. The two railroads maintained that they constituted a single system and that as such, their earnings did not exceed six per cent.

They brought suit in the federal District Court

in Missouri, to set aside the order of the Commission, for the reasons that (1) the Commission erred in failing to treat the two railroads as a single system, (2) it erred in ordering a recapture of excess earnings before determining the uniform reasonable rates to be charged by all carriers, and (3) that the Commission arbitrarily set too low a valuation on the properties of the St. Louis & O'Fallon Railway Company.

The District Court dismissed the complaint on the ground that the Commission's order was not confiscatory, since six per cent together with the fifty per cent of the excess earnings ordered to be held as a reserve, gave the St. Louis & O'Fallon a return of at least six per cent on the railway's own valuation. For this reason, the Court held, it was not necessary to review the Commission's valuation of the O'Fallon properties. The Court also upheld the Commission's determination that the two roads did not constitute a single operative system. The railroads then appealed to the Supreme Court of the United States.

What Constitutes a Single System

The St. Louis & O'Fallon Railway Company is a "Class 2 Steam Road" extending westward from the coal mines of the St. Louis & O'Fallon Coal Company to East St. Louis, Illinois, where it connects with the tracks of a subsidiary of the Terminal Railroad Association. The Manufacturers' Railway Company is a "switching and terminal

Class 3 Road''. The great bulk of its business consists in switching cars for connecting lines in St. Louis, Missouri. The majority of the stock in both railroads is owned by the estate of Adolphus Busch. Three members of the O'Fallon's Board of Directors constitute a majority of the Manufacturers' Board. In short, the railroads claimed that the two roads were operated as if they were one corporation, except that the accounting and the reports of the railroads are separate. They argued that the benefits of the provision in the Act for valuating railroad systems should apply whenever there is common ownership and control.

The Commission found that the roads did not constitute a system because there was no unity in their operation and because only a small percentage of traffic originating on the O'Fallon moved to points on the Manufacturers' road. In its argument in the Supreme Court, the Government took the position that this was a question of fact on which the Supreme Court should not overrule the Commission, unless its findings were not supported by evidence. The Supreme Court accepted the Commission's conclusion on this question.

Must Uniform Rates Precede Recapture

The railroad company maintained that when the Transportation Act was passed, it was anticipated that the new rate-making rule for uniform rates would result in substantial increases in rates and in the net operating income of some of the carriers.

The company argued therefore, that this rate-making rule and the recapture provisions were interdependent; that the recaptures are limited by the Act to earnings derived from the compliance with the new rate-making rule; that the Commission made no attempt to establish uniform rates; that therefore it was not within the power of the Commission to put the recapture provision into effect.

The Government argued that such was not the intention of Congress, but that, on the contrary, Congress had set March 1, 1920, as the date when the recapture period was to begin, although Congress knew that the Commission had been engaged in valuating the railroads since 1913 and that its task had by no means been completed. The Supreme Court held with the Commission on this question.

The Theory of Valuation

At the time the Transportation Act was enacted, the reproduction costs of the railroad properties throughout the country aggregated about $40,000,000,000, whereas the property investment account was only about $19,000,000,000.[4] Immediately the question arose, what theory of valuation the Commission would adopt. The original cost, prudent investment, the reproduction cost theory and other theories of value suggested themselves. Each of these theories is based on considerations which are

[4] 59 *Congressional Record*, Part I, p. 126 et seq.; 59 *Congressional Record*, Part IV, p. 3269; See also *Excess Income of St. Louis & O'Fallon Railway Co.*, 124 I. C. C. 3, 32.

important in determining the value of an operating railroad system. Each, however, has its objectionable features when applied exclusively in determining the value of a railroad system in its relations to all other pertinent economic facts.

In arriving at the value of the O'Fallon properties, the Commission did not adopt any of these theories of value. It emphatically rejected the reproduction cost theory, having characterized it as "inconsistent with any sound conception of justice" and as economically unsound. The Commission leaned strongly toward the prudent investment theory as making for stability and as providing for a fixed rate base, but it did not follow that theory.[5]

The Commission arrived at its own "synthetic" value of the O'Fallon properties as follows: (1) It determined the reproduction costs, less depreciation at pre-war prices, of the property acquired prior to June 30, 1914; (2) to this were added the actual costs from July 1, 1914, to June 30, 1919, in excess of reproduction costs at 1914 prices; (3) to this was added an amount for working capital; (4) also an allowance for land at the present value; (5) about five per cent for intangibles, such as going concern value and (6) for each of the recapture periods there was added the actual investment in additions and improvements less retirements subsequent to June 30, 1919. By this method, the Commission determined the basic valuation of the O'Fallon to be

[5] *Excess Income of St. Louis & O'Fallon Railway Co.*, 124 I. C. C. 3.

$850,500 whereas the minimum value claimed by the railroad was $1,350,000.

The railroad maintained that this method of valuating the properties, while simple, did not result in a "true" valuation, especially since in the case of the St. Louis & O'Fallon Company, the property consisted mainly of rolling stock which had a definite second-hand market value. The O'Fallon further maintained that the Commission used a mere "formula" to which it subjected the valuation of the railroad properties, without exercising judgment or giving due consideration to the relevant facts, especially to the reproduction costs.

The Commission, in its report, stated that it had not used any "formula", but that "it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition called to its attention on behalf of the carrier." Before the Supreme Court, it maintained that it did take into consideration the reproduction cost theory, as well as the prudent investment theory, and all other elements of value and that it exercised "reasonable judgment" based on a proper consideration of all relevant facts, without basing the valuation on any single theory. The Commission further maintained that, in accordance with prior decisions of the Supreme Court, there was no fixed rule for valuation, and that the Commission was not required to give dominant weight to the reproduction cost theory or to any other specific theory of value.

Reproduction Costs Must Be Considered

The railroad maintained, however, that the reproduction costs should have been given *substantial* consideration, and this was also the decision of the Supreme Court. The Court did not say, however, that reproduction costs must govern valuations or that they must be given *dominant* consideration. Mr. Justice McReynolds, delivering the opinion of the Court, said:

> "The weight to be accorded thereto is not the matter before us. No doubt there are some, perhaps many, railroads the ultimate value of which should be placed far below the sum necessary for reproduction. But Congress has directed that values shall be fixed upon a consideration of present costs along with all other pertinent facts; and this mandate must be obeyed."

Justices Holmes, Brandeis and Stone dissented in the case. They seemed to regard the majority opinion as ruling that *dominant* consideration must be given to reproduction costs. Justice Stone, in his dissenting opinion refutes the majority view that the Commission gave no consideration to reproduction costs and regards the expression of the majority as meaning that the Commission should have given *greater* consideration to the reproduction costs than it actually did give. He therefore concludes:

> "I should not have supposed that we could rightly set aside the present order without some

consideration of the probative value of the evidence of present reproduction costs which the Commission discussed at length in its report."

If that is the effect of the majority opinion, then indeed, it raises many difficulties of administrative law and in addition, greatly increases the task of the Commission, as was pointed out by Justice Brandeis, in his dissenting opinion.

Justice Brandeis took the position that while the Act requires the Commission to consider reproduction costs, it does not require it "to give to evidence of reconstruction costs a mechanical effect or artificial weight." In reviewing the statutes empowering commissions to find facts, he said:

"Statutes have sometimes limited the weight or effect of evidence. They have often created rebuttable presumptions and have shifted the burden of proof. But no instance has been found where, under our law, a fact-finding body has been required to give to evidence an effect which it does not inherently possess. Proof implies persuasion. To compel the human mind to infer in any respect that which observation and logic tells us is not true interferes with the process of reasoning of the fact-finding body. It would be a departure from the unbroken practice to require an artificial legal conviction where no real conviction exists."

And in reviewing the decisions of the Supreme Court on that question, he pointed out that, while

the Court has in the past set aside orders because they were entered without evidence, or because matters considered were not in the record, or because the Commission excluded facts which it should have considered, there was no case in which the Court has set aside an order of the Commission because it failed to give effect to evidence which to the Court seemed to be of probative force, or on the ground that the Commission had drawn from the evidence an inference or conclusion deemed by the Court to be erroneous; that, on the contrary, findings of the Commission involving the appreciation or effect of evidence have been treated with the deference due to a tribunal "appointed by law and informed by experience."

Effect of the Decision

Immediately after the decision much speculation arose as to its effect on the valuation of the country's transportation system. Mr. Justice Stone, in his dissenting opinion, estimated that the decision, if given effect in all cases, would result in raising the valuation of the railroads some $21,000,000,000. Other estimates gave a maximum increase of about $10,000,000,000. These increases, however, will not be due entirely to the O'Fallon decision. The present primary valuation of about $21,000,000,000 is based on a valuation of properties acquired before 1914 and additions to the properties up to June 30, 1919. With the gradual retirement of these properties and their replacement by new plants, roads

and equipments, the original costs and the reproduction costs will gradually converge to the same figure.

Valuation Work Little Affected

The valuation work already accomplished by the Commission is little affected by the O'Fallon decision. It has been suggested that since the O'Fallon decision was directed against the methods of valuation adopted by the Commission, the tremendous amount of valuation work already done will be scrapped. The O'Fallon decision will have no such effect. Thus far, the Commission has expended over $34,000,000 in valuation work of which only about $10,000 is attributable to the O'Fallon. Furthermore, the O'Fallon is the only railroad against which a recapture order has been issued.

Part of the costs of valuation are applied to lands. This is unaffected by the decision. The greater part of the valuation work of the Commission was spent mainly in gathering inventories and inventory changes between 1914 and 1919. These are not yet out of date. Furthermore, whether the O'Fallon decision had resulted in favor of the Commission, or, as happened, against it, the Commission would have been obliged to gather this data in accordance with the provisions of section 19 (a) of the Interstate Commerce Act.

Part of the costs already incurred prepared the way for a cumulative inventory of the railroad's properties, as of December 31, 1927, which will serve

as a new valuation base for rate-making purposes. That, of course, has likewise not been affected by the O'Fallon decision.

The Commission will thus utilize all the data it has gathered for the purpose of arriving at the aggregate value of the railroads in order to carry into effect the policy adopted by Congress in the Transportation Act of 1920. But it will have to give greater consideration and weight to the reproduction cost theory in accordance with the O'Fallon decision.

As has been pointed out, the Supreme Court held, with the Commission, that the recapture provisions of the Transportation Act were applicable though no uniform transportation rates have been established throughout the country or for groups of carriers. Had the recapture provisions in the Transportation Act been held not applicable until uniform rates had been instituted, that would probably have delayed their effectiveness indefinitely. And had the Commission not adopted its policy of awaiting the decision of the Supreme Court in a test case before issuing further recapture orders, much labor would have been lost and the revised recapture orders would have been proportionately delayed. As it is, the delay in the effectiveness of the recapture provision on account of the O'Fallon decision will not be serious. On the other hand, it is evident that the amounts of recapture will be considerably diminished.

The Commission will have to devise practical means for making annual reproduction cost valuations of all the railroads. In the arguments before the Supreme Court, the Commission urged that, unless it is permitted to adopt a synthetic method of valuation, the task of putting the policy of Congress into effect would become too burdensome and doubtful of practical achievement. This was also the view of Mr. Justice Brandeis, in his dissenting opinion, with reference to the task of making an annual valuation on the basis of reproduction costs, less depreciation (both physical and functional).

The Problem of Confiscation

It is interesting to note that, while the O'Fallon Case originated and was argued as a confiscation case, the Supreme Court did not pass on the question of confiscation, but limited itself to the construction of the statute. The railroad argued that the order of the Commission, requiring it to impound one half of its excess profits, was a taking of private property without due process, and was compelling the railroad to operate without a fair return on its investments. The District court dismissed this question of confiscation by holding that the railroad could not complain because, on the basis of its own valuation, the earnings allowed by the Commission plus the reserve fund, gave it more than six per cent. And in the Supreme Court, the Commission, in answer to the railroad's argument maintained that the order to establish a reserve fund

was a reasonable regulation of the railroad's property and that more drastic and more effective financial regulations had been previously upheld by the Supreme Court.

The Supreme Court did not go into the matter. It held that the railroad had a right, under the statute, to have the reproduction cost values applied to its properties and that it was the duty of the Commission to follow the mandate of Congress in its valuation methods.

The O'Fallon decision requiring the Commission to give due consideration to the reproduction costs of each recapture period will undoubtedly increase the work and expense of valuation. To what extent cannot now be foretold.

Ultimately, this decision will undoubtedly have its effect not only on the valuation of railroads, but also of other public utilities throughout the country. In fact, the first case involving the interpretation of the O'Fallon decision is already before the Supreme Court. The City of Vincennes, Indiana, petitioned the Supreme Court to review the decision of the Circuit Court of Appeals for the Seventh Circuit, which set aside the valuation placed upon the properties of the Vincennes Water Supply Company by the Public Service Commission of Indiana, and held that the proper basis of valuation is reproduction cost.[6]

[6] No. 197—(October Term, 1929) *City of Vincennes v. Vincennes Water Supply Co.* While this book was in press, the Court denied the petition, October 21, 1929.

Power to Maintain Minimum Rates

The Lake Cargo Cases [7] evoked a great deal of public interest, but they were disposed of by the Court without passing on the merits of the question involved. The question was whether the Interstate Commerce Commission had power to order railroads to maintain minimum transportation rates. The southern railroads had reduced the rates on coal from the southern coal fields to the Lake Ports by twenty cents per ton, and the Interstate Commerce Commission issued an order forbidding the lower rate. The Commission acted on the theory that the lower rates were not compensatory and would impose an undue burden on other types of freight. The northern railroads and the northern coal operators likewise objected to this reduction in rates on the part of the southern railroads, for the reason that the reduced rates resulted in giving the southern coal fields an undue advantage in competing with the northern coal mines for shipments of coal to the Lake Ports.

The District Court in West Virginia, where the railroads brought suit, set aside the order of the Commission, holding that the order was based on commercial considerations rather than on issues relating to transportation. The Commission, the northern coal companies and the northern railroads appealed to the Supreme Court. Between the time the appeal was allowed and the time of the argu-

[7] No. 355—*United States et al. v. Anchor Coal Co. et al.*, March 5, 1929.

ment, however, the railroads had reached a compromise, raising the rates ten cents per ton. This rendered the order of the District Court ineffective so far as the Commission was concerned, and the Supreme Court therefore dismissed the case as having become moot.

Long Haul Provision Interpreted

When the Interstate Commerce Commission ordered the Missouri Pacific to establish a through route for westbound freight traffic over the Fort Smith, Subiaco and Rock Island, the Missouri Pacific [8] contended that the order was contrary to the "long-haul" provision in the Interstate Commerce Act. The Commission interpreted the provision as applying only to freight which originated with the carrier, and not to freight which it received from a connecting carrier. The Supreme Court held that the wording of the statute did not admit of such an interpretation and held the order of the Commission invalid.

The "long and short haul" argument was also set up by several railroads when the Commission ordered them to cancel their increased rates on grain shipped from the grain fields to Kansas City or Wichita.[9] These increases in rates were the result of the export-grain-freight warfare among the competing railroads.

[8] No. 19—*United States et al. v. Missouri Pacific Railroad Co.*, Jan. 2, 1929.

[9] No. 466—*Atchison, Topeka & Santa Fe Railroad et al. v. U. S. et al.*, June 3, 1929.

Great quantities of grain are shipped for export by the Atchison, Topeka and Santa Fe, the Chicago, Rock Island & Pacific and the Missouri Pacific from the grain fields of Kansas, Nebraska, Colorado and other mid-western states to the Gulf Ports. Most of the grain goes through Kansas City, Mo., and Wichita, Kansas, where it may be stopped for cleaning, clipping, milling, etc. The movement into Kansas City and Wichita is over these lines.

Other carriers, however, among them the Kansas City Southern, also run from Kansas City and Wichita to the Gulf Ports, and these carriers are able to secure any of the grain traffic after the grain has been cleaned, clipped or milled. These carriers thus operate in competition with the Santa Fe, the Chicago Rock Island and the Missouri Pacific from Kansas City and Wichita to the Gulf Ports.

Originally, the rate from Kansas City and Wichita to the Gulf Ports was a standard rate of 30.5 cents per hundredweight. Later, the three carriers put in effect the same rates via Kansas City or Wichita with cleaning, clipping and milling privileges at those points, as were charged by them for transportation from the grain fields direct to the Gulf Ports. These reduced rates, however, were so limited that advantages could be taken of them only if the three lines secured the haul not only into Kansas City or Wichita from the grain fields, but also from those cities to the Gulf. This arrangement had the

effect of disrupting the standard rate of 30.5 cents over all the lines from Kansas City or Wichita to the Gulf, for to meet this situation, the competing lines made a somewhat similar arrangement by lowering their rates.

The Santa Fe, The Chicago & Rock Island and the Missouri Pacific then resorted to another method. They proposed to establish rates from the grain fields to Kansas City or Wichita which would be higher than the rates theretofore in effect, and they were to collect the higher rates into those cities in case the movement to the ports was over other lines; otherwise, the shipper could have the benefit of the lower rate.

The Interstate Commerce Commission found that the higher rates from the grain fields to Kansas City and Wichita were not justified and ordered those rates to be suspended. The Santa Fe and the other two carriers brought suit in the Federal District Court in Illinois to have the order set aside, but the District Court dismissed the suit for want of equity, and the carriers appealed to the Supreme Court.

Here they argued that the publishing of the rates to Kansas City and Wichita, which "varied" depending on whether the same lines secured the outbound haul to the Gulf, was an exercise of their right to secure to themselves the long haul, and that the order of the Commission would in effect compel them to surrender traffic to other railroads, and thus

deprive them of the benefits of the long haul provision.

The Commission and the Kansas City Southern argued in opposition that the only long haul the appellant railroads were entitled to, was as far as Kansas City or Wichita, for until the grain reached those points, no one knew whether it was in fact going to move beyond.

The Supreme Court found, with the Commission, that when the grain was shipped to Kansas City or to Wichita to be cleaned, clipped, etc., the ultimate destination of the grain was uncertain, and that therefore the railroads were not entitled to the benefits of the long haul provision.

Mail Rate Order Upheld

Among the orders of the Commission sustained by the Supreme Court during the past term was the one increasing the rates charged by the railroads for transportation of United States mails, and making the increase retroactive to the time when the railroads petitioned for the same. The Government contended that the retroactive feature of the order was invalid. The Supreme Court held that since the law compels the railroads to carry mails, they are at all times entitled to fair compensation; and to save the law from being unconstitutional it must be interpreted as giving the Commission authority to determine reasonable rates and make its order

retroactive to the time when the railroads protest against the existing rates, if those are not compensatory.[10]

Orders of State Commissions

The orders of state commissions, as applied to interstate carriers, figured prominently in a number of cases. The most important of these was the conflict between the Public Utilities Commission of Alabama and the Interstate Commerce Commission in the Fertilizer Rate Case.[11] The Alabama Commission ordered a reduction of rates on transportation of fertilizers and fertilizer products between points within the state. The Interstate Commerce Commission found that the lower intra-state rates worked an unjust discrimination against interstate commerce, and ordered the railroads to maintain, on intra-state shipments, rates which would not be less than the interstate rates. The Alabama Commission sought to enjoin the order of the Interstate Commerce Commission, but the District Court in Alabama would not grant an interlocutory injunction. From this order the Alabama Commission appealed to the Supreme Court, which dismissed the appeal on the ground that from the record it was not shown that the lower court abused its discretion in refusing an interlocutory injunction.

[10] No. 238—*United States v. New York Central Railroad Co.*, March 11, 1929, and No. 304—*U. S. v. Nevada County Narrow Gauge Railroad Co.*, March 11, 1929.

[11] No. 166—*Alabama Public Service Commission v. U. S. et al.*, April 8, 1929.

The Alabama law prohibiting railroads to abandon any part of their service without obtaining permission from the State Public Utilities Commission was attacked by an interstate carrier as imposing an undue burden on interstate commerce.[12] In that case, however, the railroad did not pursue the administrative remedies provided by the State law, but sought to enjoin the Alabama Commission from enforcing the law. The Supreme Court held that the railroad could not resort to the Federal Courts without exhausting its administrative remedies. It remanded the case, however, with instructions that the railroad be permitted to file its application with the Commission, reserving its right to proceed further should the decision of the Commission be adverse to the carrier.

The rule that a public utility must first exhaust its administrative remedies before appealing to the courts was also involved in the "Shops and Division Points Case," which questioned the constitutionality of the law of Oklahoma forbidding railroads to transfer their shops and division points, located at a given place for more than five years, without first obtaining permission of the Corporation Commission of the State.[13]

At the time the St. Louis-San Francisco Railway Company acquired certain lines in Oklahoma, shops

[12] No. 568—*St. Louis-San Francisco Ry. Co. v. Alabama Public Service Commission*, May 20, 1929.

[13] No. 99—*J. F. Lawrence et al. v. St. Louis-San Francisco Ry. Co.*, January 2, 1929.

and a division point were maintained at Sapulpa. The City of Tulsa grew more rapidly than Sapulpa, and the railroad found it expedient to move its shops and terminal from Sapulpa to West Tulsa.

About 1916, citizens in Sapulpa brought a complaint to the Corporation Commission of the State to prevent the railroad from moving the shops and terminal, alleging that this would work a great hardship upon them. About the same time, the Legislature of Oklahoma passed an Act forbidding any railroad from moving shops or division points, which had been located at any place in the State for a period of five years, to another point in the State, without first securing the permission of the Corporation Commission.

Upon the complaint filed, the Commission entered a temporary order prohibiting the Railway Company from moving the shops and terminal until a hearing before and a further order by the Commission.

For ten years, nothing was done either by the railroad or the Commission. In 1926, the Company again determined to move the shops and terminal, and the Corporation Commission again issued a temporary restraining order and set the case for hearing in January of 1927.

The Railroad Company did not appear before the Commission, but brought suit in the United States District Court, consisting of three judges, to restrain the enforcement of the Shop and Division

Point Act of the State, maintaining that the same was without due process and was contrary to the Interstate Commerce Act. The Court issued an interlocutory injunction, which was appealed by the Corporation Commission to the Supreme Court of the United States.

The Supreme Court reversed the order of the District Court on the ground that the railroad had not exhausted its remedies before the Corporation Commission and that therefore the District Court had no jurisdiction in the case.[14] In the meantime, however, the Railway Company had moved its shops and terminal.

The case was remanded to the District Court, and in accordance with the direction of that court, the Railroad applied to the Corporation Commission to ratify the removal of the shops and terminal. The Corporation Commission, however, refused to act upon the application, because it held that the Railroad Company was guilty of contempt, and in its application it had not purged itself of contempt by offering to restore the shops and division point, should the Corporation Commission decline to ratify the removal.

The District Court in Oklahoma then issued its final order permitting the removal, holding that the Shop and Division Point Act of Oklahoma was contrary to the due process clause of the Constitution

[14] *Lawrence et al. v. St. Louis-San Francisco Ry. Co.*, 274 U. S. 588.

and contrary to the Interstate Commerce Act, since the railroad in question was an interstate carrier.

The citizens of Sapulpa who had brought the complaint appealed to the Supreme Court, maintaining that the statute was a valid exercise of the police power of the State, having been enacted for the preservation of the health, safety and convenience of the railroad's employees, of the communities in which the shops and terminals were located, and of the general public welfare. They further maintained that the statute was not a regulation of interstate commerce because the effect on interstate commerce was very remote and indirect, and that it was the duty of the District Court to require the railroad to restore the shops and terminal existing when the temporary injunction was issued, since the Supreme Court of the United States had reversed the previous order of the District Court.

The Supreme Court decided this case in favor of the railroad. It held that the former decision to the effect that the District Court had no jurisdiction, did not disturb the validity of the decree itself, and that the decree of the District Court, which left the railroad free to move the shops and terminal before a final hearing, superseded the order of the Corporation Commission; hence the railroad was not guilty of contempt, and the Commission should not have required the railroad to purge itself of contempt. For this reason the Court also held that the refusal of the Commission to consider the rail-

road's application for a ratification of the acts done pursuant to the interlocutory decree of the District Court, amounted to a denial of the application. The railroad thus exhausted its remedies before the Commission, and the case was then properly before the District Court.

In disposing of the merits of the controversy, the Court did not pass on the constitutionality of the Oklahoma statute itself. But in view of the costs which would be involved in restoring the shops and terminals to Sapulpa, the Court held that the order of the Commission denying the application of the railroad was an unreasonable burden on interstate commerce, and therefore invalid. The Supreme Court thus affirmed the decision of the District Court.

Railroad Consolidations

Within the past few years a number of cases came to the Supreme Court involving the consolidation provisions of the Transportation Act. In the case of *Snyder* v. *The New York, Chicago and St. Louis Railroad Company,*[15] the Supreme Court of Ohio held that the Ohio Railroad Consolidation Law, permitting railroads to consolidate by entering into an agreement and filing the same with the Secretary of State, is not in conflict with the consolidation provisions of the Transportation Act of 1920. In so holding the Supreme Court of Ohio interpreted the Transportation Act as not empowering the Inter-

[15] No. 82—*J. Royal Snyder v. New York, Chicago & St. Louis Railroad Co.*, Dec. 3, 1928; Jan. 2, 1929.

state Commerce Commission to approve of isolated consolidations, until after the adoption of a complete plan for the unification of railroads throughout the country.

This case originated when the New York, Chicago & St. Louis Railroad Company, an Ohio consolidated company, brought condemnation proceedings for the purpose of acquiring property belonging to Snyder. His defense was that the railroad was not a corporation which, under the law of the state, had powers of eminent domain, and furthermore that the Ohio Railroad Consolidation Law was unconstitutional, because the Federal Government has, by means of the Transportation Act, entered into the field of railroad consolidations.

When the Supreme Court of Ohio ruled against him, Snyder appealed to the Supreme Court of the United States, maintaining that the Ohio law was unconstitutional because it was in conflict with the Transportation Act. The Supreme Court dismissed the appeal on the ground that the case presented no substantial federal question. Later, however, the Supreme Court changed its order, affirming the decision of the Ohio Supreme Court on the ground that the Transportation Act "has not yet become applicable to cases like this."

Grade Crossing Accidents

Much interest was evoked by the Supreme Court's decision last year[16] that automobilists must stop,

[16] *Baltimore & Ohio Railroad Co. v. Goodman*, 275 U. S. 66.

look and listen when approaching railroad crossings, and that railroads are not liable for grade crossing accidents. Justice Holmes who delivered the opinion of the Court laid down that rule as a standard of care "once and for all." This did not mean, however, that railroads were absolved from a duty of care in preventing grade crossing accidents.

This year the Circuit Court of Appeals held that a railroad was liable for negligence, when one of its trains ran into an automobile crossing the tracks. The railroad petitioned the Supreme Court to review this decision, relying on the rule laid down by Justice Holmes, but the Court denied a review.[17]

Safety Measures

After the decision of the Grade Crossing Case last year, it was felt that the duty would devolve upon states and municipalities to eliminate grade crossings, or to adopt methods for making them safe. In the state of New Jersey, the Public Utilities Board ordered the Lehigh Valley Railroad Company to reconstruct a crossing at an estimated cost of $324,000, exclusive of property damage. The Railroad sought to enjoin the enforcement of the order on the ground that it was unreasonable

[17] No. 339—*Chesapeake & Ohio Railroad Co. v. John Waid*, Oct. 22, 1928; but see also No. 749—*Cornelius J. Anderson v. Pere Marquette Railway Co.*, April 15, 1929, in which the Circuit Court of Appeals for the 7th Circuit denied recovery under the Indiana Death Act for death resulting from a grade crossing collision, and the Supreme Court declined to review that case.

and arbitrary, and contrary to the Interstate Commerce Act, which forbids interstate carriers to make unreasonable expenditures for structure and maintenance. The injunction was denied, and on appeal the Supreme Court affirmed the decision,[18] holding that the order was a proper exercise of the State's police power and that it was not within the province of the courts to overrule a state commission merely because more economical ways of altering the crossing might be suggested.

The City of Nashville, Tennessee, had passed an ordinance requiring railroads to station flagmen at every street crossing where the railroad runs through the city. In a case[19] involving a grade crossing collision, the Nashville, Chattanooga and St. Louis Railroad maintained that the ordinance was arbitrary, unreasonable and oppressive, and therefore without due process of law, because it requires that human flagmen be placed at the crossings, without permitting railroads to substitute electrical or mechanical devices to warn automobilists of approaching trains. The Supreme Court, in an opinion by Mr. Justice Holmes, sustained the validity of the ordinance, holding that it was not arbitrary or unreasonable, since automobilists are apt to disregard mechanical signals.

[18] No. 24—*Lehigh Valley Railroad Co. v. Board of Public Utility Commissioners of New Jersey*, Nov. 19, 1928.

[19] No. 135—*Nashville, Chattanooga & St. Louis Railway v. R. D. White*, Feb. 18, 1929.

On the other hand, the Supreme Court held invalid [20] the law of the State of Georgia which raised the presumption of negligence on the part of railroads in accidents occurring through the operation of engines and trains. The constitutionality of the law was questioned in a case arising out of a grade crossing collision, and the Supreme Court held that the presumption was contrary to the due process clause of the Constitution, because there was no reasonable connection between the accident and the negligent operation of the railroad.

[20] No. 519—*Western & Atlantic Railroad v. Mary E. Henderson*, May 27, 1929.

III

PUBLIC UTILITIES

From the decisions on railroad problems, we pass to the general field of public utilities. The Interborough Rapid Transit Decision[1] was overwhelmingly the most important in this class of cases. Here, the issue was whether the Interborough Rapid Transit Company was bound by its contracts to operate the New York subways on a five cent fare basis, or whether the contracts entered into were not binding on the Interborough, and the company was therefore entitled to a reasonable return on its investment.

The City of New York constructed its subways at a cost of about $400,000,000 and leased most of these to the Interborough for a period of 49 years. The lease contracts, entered into between the Interborough Rapid Transit Company and the City, contained agreements whereby the Company bound itself to operate the subways at a fare of five cents. Under the agreements, the revenues received from the operation were to be allocated in the following manner: After deducting sums for operating expenses, rentals, taxes, depreciation, maintenance and various other items, the Interborough was to receive a preferential profit of over $6,000,000 a year; then the City was to receive a fixed percent-

[1] No. 159—*John F. Gilchrist et al. v. Interborough Rapid Transit Co. et al.* April 8, 1929.

age of the income, and the remainder was to be divided equally between the City and the Company.

Up to the time of the present controversy, the City claimed it had not received any part of the revenue, while the Interborough had received all its preferential profits, and all the payments provided for under the contract, and had retained over $7,000,000 to which it was not entitled. This was disputed by the Interborough, but the amounts in dispute were relatively small.

History of the Controversy

The contracts between the City and the Interborough were originally entered into in 1900, and were amended in 1902, 1906 and 1913, under the authority of the Rapid Transit Act which was originally passed in 1894 and thereafter amended on numerous occasions. In 1907 the State of New York passed its Public Service Commission Law in which it divided the state into two departments, one of which embraced the metropolitan division of the City of New York. Under this Act it was provided that the Public Service Commission shall take jurisdiction over the public utilities operating in the state, and shall have all such powers as are usually exercised by public service commissions, including the power to establish reasonable rates.

After the passage of this Law, the Interborough continued entering into contracts with the City for the extension of its Rapid Transit System, but at all times adhering to the agreements that it shall

operate its subways at a rate of five cents for a single ride.

In 1922, the Interborough applied to the Rapid Transit Commission for an increase in its schedule of fares. This was rejected by the Commission on the ground that it had no jurisdiction in the case, because the rates were governed by the contracts entered into between the City and the Interborough, which contracts had been ratified by statute. On several occasions thereafter, the Interborough petitioned the Commission for an increase in fares, but its applications were rejected for the same reason.

The Interborough Rapid Transit Company then took the position that it was entitled to a fair return on its investments calculated at 8% on all the property of the City and the Company, plus the increase in the value of the property resulting from increased reproduction costs. This proposition was based on the theory that the Rapid Transit Act and the lease contracts entered into under the authority of that Act, had been abrogated by the Public Service Commission Law of 1907, that the Public Service Commission, since the passage of that Act, had authority to regulate the Rapid Transit Lines, and did regulate the same with reference to such matters as operations, bond issues, etc.; and that, therefore, under the law the Interborough was entitled to a rate which would yield a reasonable return on the property employed in the public utility.

The Interborough case became a burning question in New York City politics, and one of the main issues in the mayoralty elections was whether the five cent fare would be maintained.

On previous occasions, the Rapid Transit Commission had dismissed the petitions of the Company for an increase in fares. The Company had followed one of the remedies prescribed in the Public Service Commission Law, namely, to obtain an increase in rates by applying to the Commission. When the Interborough saw that it could not expect any favorable action from the Commission, by this method, it resorted to the other alternative allowed by the Public Service Commission Law, namely, to file an amended schedule of rates with the Commission. Under this method, the rates thus filed do not become effective for a period of thirty days, within which time the Commission may either approve the new schedule or reject it. If the Commission rejects the new schedule, then the Company may appeal to the courts. If the Commission fails to act within thirty days, the new schedule becomes operative.

On February 1, 1928, the Interborough filed amendments to its tariff schedule with the Rapid Transit Commission, promulgating its seven cent fares. It was evident that the Interborough was not going to stop with the decision of the Commission. The Commission therefore retained Mr. Samuel Untermyer, as special counsel in the case. He

wrote to the Interborough, calling its attention to the lease contracts and stating that any expenditures made by the Interborough to break its agreements with the City shall not be taken out of the revenues of this joint operation, and that the directors of the Company would be held personally liable for any expenditures sustained in this matter. It was also evident that the Commission and the City were going to file suit against the Interborough Rapid Transit Company to compel the latter to adhere to the five cent fare contract.

Things were moving fast. On Feb. 14, 1928, at 9.20 A. M., before the expiration of the thirty day period, the Interborough filed suit in the federal District Court in New York to restrain the City and the Commission from interfering with the new schedule of seven cent fares, claiming that the present rate was insufficient to yield a reasonable return, and that therefore the rate was confiscatory. At 10.30 A. M., the Transit Commission rejected the application of the Interborough, and at 11.55 A. M., the Commission and the City brought suit in the Supreme Court of New York against the Interborough to enjoin it from breaking its five cent fare contract, and at the same time secured from the state court an order restraining the Interborough from putting into effect its increased fares.

Thus there were two actions pending in the courts, and the question arose which court had the proper jurisdiction. The City maintained that the

Interborough could not bring suit without first exhausting its administrative remedies and that, since it did not wait for the order of the Commission, the federal court had no jurisdiction. The Interborough claimed that immediately upon the filing of its application, it had been threatened with prosecution by the Commission and that therefore it had no other alternative but to resort for protection to the federal courts. It claimed, therefore, that the state courts had no jurisdiction, because at the time the action was filed there, the matter was already pending in the federal courts. The Interborough obtained an order from the federal court restraining the action in the state court.

A statutory court of three judges was convened in the U. S. District Court for the Southern District of New York, and upon a hearing held, the court issued an injunction restraining the City and the Commission from interfering with the Company's seven cent fares. The Court refused to stay its mandate until an appeal could be prosecuted to the Supreme Court of the United States.

The case was then moved to Washington. Justice Stone granted a stay of mandate until the next session of the Supreme Court, and within a short time thereafter the Court granted a stay. The case was advanced on the Court's docket and was argued on October 15th, 1928. Seven hours were allowed for the arguments, which is five and a half hours more than is usually allowed to cases advanced.

Later, the Court ordered a reargument which consumed another seven hours.

The arguments of the Interborough centered mainly about the question of confiscation, unreasonable return and the unfairness of the City in building new subway systems of its own in competition with the Interborough. The contract agreements, the Interborough maintained, had been abrogated by the Public Service Commission Law which gave to the Commission jurisdiction to regulate and prescribe a reasonable rate to be charged by the Rapid Transit Lines as well as by other public utilities.

As to the argument of confiscation, the City and the Commission maintained that the Interborough has been receiving an ever increasing profit on its operations; and, considering that the subways were owned by the City and that the Interborough had only a temporary interest in the investment, the rate of return it received was not confiscatory. The City went further, arguing that the Interborough was not a public utility at all but was merely an operating agent for the City and that, therefore, it was not entitled to the application of the rule as to reasonable rates chargeable by public utilities.

In answer to the Interborough's contention that the Public Service Commission Act superseded and abrogated the Rapid Transit Act in the matter of the five cent fare agreement, the City argued that the State had not abrogated either the agreement or the prior laws under the authority of which the

agreements were entered into, but that on the contrary, the State had at all times safeguarded these contracts from interference and also safeguarded the City's policy to have its rapid transit facilities operated through lease contracts.

To the argument concerning unfair competition in the building of the City's new subways, the City pointed out that these were not built until the traffic on the Interborough Line had reached the point of saturation.

The Rapid Transit Commission argued that the federal courts had no jurisdiction in the case; assuming that the Public Service Commission had jurisdiction to consider the Interborough's new schedule of seven cent fares, then at the time the Company filed suit in the federal court, it had not yet exhausted its remedies before the Commission; and when the Commission finally did act by rejecting the new schedule, the City had already filed its complaint in the state courts, which therefore had prior jurisdiction over the suit filed in the federal court.

This was important, because the case of the Interborough hinged upon the construction of a state statute, and the rule of construction is that federal courts are bound by the interpretations of state statutes made by the highest court of their respective states.

In this connection, the Interborough advanced a subtle argument. Mr. Charles Evans Hughes, ar-

guing for the Company, maintained that the test, whether the administrative remedies had been exhausted is whether the Company could have expected anything further from the Commission. Mr. Hughes apparently relied on the "Shops and Division Points" case,[2] decided by the Court shortly before the reargument in the Interborough case. Mr. Hughes pointed to the fact that the subway rates became a by-word in New York politics, that the Mayor and the Commission's counsel had made strong statements through the press, all of which clearly indicated that the Interborough could look forward to no favorable consideration on the part of the Commission.

The Supreme Court, speaking through Mr. Justice McReynolds, took the view that the Interborough could not have resorted to the courts without a decision by the Commission within the thirty day period prescribed by law. The Court went beyond the decision on the question of jurisdiction. It frowned upon the Company's attempt to have the issues determined by injunction. Said Justice McReynolds:

> "The Transit Commission has long held the view that it lacks power to change the five cent rate established by contract; and it intended to test this point of law by an immediate orderly appeal to the courts of the State. This purpose should not be thwarted by an injunction."

[2] No. 99—*Lawrence et al. v. St. Louis-San Francisco Railroad Co.* Jan. 2, 1929. See p. 36, supra.

Although the Supreme Court did not decide on the question of confiscation, it overruled the Interborough's contentions because they were not supported by the record. The Interborough maintained that it was entitled to a fair return on all the property invested in the subways, whether by the City or by the Company. The reason assigned for this contention was that under the contract the City and the Interborough shared in the income derived from the operation of the subways. Therefore, the Interborough argued, the fair return should be based on the entire investment. If, however, the fair return is based on the Company's investments alone, then the City's income should be eliminated from the determination of what constitutes a fair return. To this the Court said:

> "The claim for an eight per cent return upon the values of subways, which are the property of the City * * * is unprecedented and ought not to be accepted without more cogent support than the present record discloses."

And after reviewing the investments made by the Interborough and their present value, the Court further concluded:

> "Considering the probable fair value of the subways and the current receipts therefrom no adequate basis is shown for claiming that the five cent rate is now confiscatory in respect of them."

The Problem of Rate Regulation

Although the immediate issue in the Interborough Rapid Transit Case was whether the people of New York would continue to pay a five cent fare, the case involved the broad nation-wide question, under what circumstances is a public utility bound to serve the public at rates prescribed in its contracts.

Without an agreement as to rates, a public utility may not charge for its service more than a reasonable rate, and it is within the police power of the State to regulate public utilities and to enforce reasonable rates. On the other hand, a public utility is entitled to charge a reasonable rate, that is, it is entitled to a reasonable return on its investment, and if the State attempts to enforce a rate which does not yield a fair return, the rate is said to be confiscatory, deprives the utility of property without due process of law, contrary to the Fourteenth Amendment of the Constitution, and is therefore void.

Any contract made by a public utility to serve any person or group of persons, at specified rates, is subject to regulation, and even abrogation, by the State. If the contract price calls for less than a reasonable rate, the State may raise it on the ground that the public is compelled to make up the difference. But what is the situation, if the City, or other agency of the State, grants a franchise, or passes an ordinance, or makes an agreement on the condition that the utility operate at a fixed rate?

Such provisions as to rates have been and are inserted into various franchises, agreements and ordinances, under which public utilities are permitted to operate in cities of the United States.

The answer to the above question depends on whether the particular agency of the State had the power to bind itself, or the State, by a rate agreement. If the State's agency, making the contract, is without power to bind the State as to rates, it follows that the public utility is likewise not bound; and if the provision as to rates is not binding on the parties to the agreement, then it is within the police power of the State to reduce the rates so as to yield the public utility only a reasonable return on its investment, and, on the other hand, the public utility may demand that the rates be increased so as to allow it a compensatory rate.

In a number of cases, which within recent years have come before the Supreme Court, the provisions as to fixed rates in contracts, franchises or ordinances were upheld by the Court as binding contracts.[3] The decisions were based either on the theory that, under the law of the state the city or the commission had unlimited authority to make such contracts, or on the theory that the state had

[3] *Detroit v. Detroit Citizens Railroad Co.*, 184 U. S. 368; *Cleveland v. Cleveland City Railroad Co.*, 194 U. S. 517; *Vicksburg v. Vicksburg Water Works Co.*, 206 U. S. 496; *Columbus Railway etc. Co. v. Columbus*, 249 U. S. 399; *Georgia Railway & Power Co. v. Decatur*, 262 U. S. 432; *Superior Water, Light & Power Co. v. City of Superior*, 263 U. S. 125; *City of Opelika v. Opelika Sewer Co.*, 265 U. S. 215.

not interfered in any manner with the authority to enter into such agreement.

In a number of cases, however, the rates agreed upon were held not binding. These cases divide themselves into two main classes: those in which it was held that, at the time of the contract, the City or Commission was not authorized to enter into binding agreements fixing rates, and those in which, although the City or Commission originally had the power to enter into such contracts, its power was either taken away or the particular public utility had been taken out of the operation of the contract.

In the first class, we find the cases of the Denver Tramway Company,[4] the San Antonio Public Service Company,[5] and the Southwestern Bell Telephone Company,[6] in which the Supreme Court held that the companies were entitled to charge reasonable rates despite the rates fixed in the ordinances or agreements. The reason underlying these decisions was that the constitutions of the various states prohibited any irrevocable or uncontrollable grant of special privilege. Under such provisions in state constitutions fixed rates are not binding, but are subject to the regulatory powers of the state legislatures. A case recently decided by the Statutory United States District Court in Los Angeles falling

[4] *City and County of Denver v. Stenger*, 277 Fed. 865.

[5] *San Antonio v. San Antonio Public Service Commission*, 255 U. S. 247.

[6] *Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U. S. 276.

into this class, was that of the Los Angeles Street Railway Company.[7] Here it was held that the rates were not binding on the railway company because, at the time the franchise agreement was entered into, the Constitution of California prohibited the granting of unlimited or uncontrollable privileges to public utilities.

This works both ways. In the above cases, the Supreme Court held that the public service utilities were entitled to charge a reasonable rate, which was greater than the one originally agreed upon. On the other hand, in cases involving the Puget Sound Traction Company,[8] the Freeport Water Company[9] and the Southern Iowa Electric Company,[10] it was held that the public utilities were not entitled to the higher rates provided in the franchises, but were limited to a reasonable rate.

The second class of cases, in which the rates were held not binding, deals with the situation where the provision as to rates constituted a valid contract, but where the state stepped in and exercised its regulatory powers, thereby abrogating the contract as to rates. This happened in the case of the Philadelphia Rapid Transit Company,[11] where the Company was operating under a lease agreement, much

[7] *Los Angeles Railway Corp. v. California Railroad Commission et al.*, 29 Fed. (2) 140.

[8] *Puget Sound Traction Co. v. Reynolds*, 244 U. S. 574.

[9] *Freeport Water Co. v. Freeport*, 180 U. S. 587.

[10] *Southern Iowa Electric Co. v. City of Chariton*, 255 U. S. 539.

[11] No. 477—*Sambor v. Philadelphia Rapid Transit Co.* Dec. 3, 1928.

in the same manner as the Interborough Rapid Transit Company is operating in New York City. The Philadelphia Company applied for an increase in fares before the Public Service Commission, and the increase was granted. A taxpayer's suit was brought to enjoin the Company from charging the increased fares, maintaining that the order of the Commission constituted a violation of contract and was therefore unconstitutional. The Statutory District Court in Philadelphia dismissed the complaint, and the Supreme Court refused to take jurisdiction on the ground that there was no substantial federal question in the controversy.

The most noteworthy case in this class is that of the Pacific Telephone and Telegraph Company, decided by the Supreme Court during the preceding term.[12] In that case the Company was operating under franchise rates pursuant to agreements with the City of Seattle. During the period of Government control, the Postmaster General took jurisdiction over the Company and instituted his reasonable rates. After the period of Government control, when costs were high, the Company applied to the Board of Public Works for permission to continue the rates prescribed by the Postmaster General. This was granted. Later, the Board attempted to reduce the rates, which, if carried out, would still have permitted the Company to charge a higher rate than that fixed in the franchise agreement. The

12 *Denney, Director of Public Works of Washington v. Pacific Telephone & Telegraph Co.*, 276 U. S. 97.

Company brought suit to enjoin the Board of Public Works from enforcing the proposed reduction on the ground that such rates would be confiscatory. The Supreme Court held that, having permitted the Company to charge a rate greater than was prescribed in the franchise agreements, the Board had taken jurisdiction over the Company, that it had therefore abrogated the franchise agreements as to rates, and that thenceforth the Company was entitled to a compensatory rate.

The Interborough Rapid Transit Company maintained that its case fell into the class of cases in which the fixed rate contracts were held to have been abrogated by the state. In fact, however, it cannot be said that the Interborough Rapid Transit Case was like any of the cases which preceded it. There were many differences which put this case into a class by itself. We have already mentioned the intricate jurisdictional questions, and the problems of valuation and confiscation. But there was a further point of difference. The question arose whether the Interborough had a constitutional right to compel the Public Service Commission to abrogate the contract and to raise the fare, assuming that the Commission had the power to do so. In the previous cases mentioned, and especially in the Pacific Telephone and Telegraph Company Case, the state commission was held to have actually stepped in and abrogated the contract as to rates. Here, the question arose whether under the Public

Service Commission Law, the Commission not only had the power, but was also under a duty to abrogate the contract provision. This, the Supreme Court intimated, should be determined by the New York courts.

As stated above, the Interborough case, though local in character, raised a question which reflects a nation-wide problem. The Philadelphia Rapid Transit Company's controversy has already been mentioned. During the term also the Denver Tramway Company case came to the Supreme Court on the petition of the City of Denver to review the decision of the Circuit Court of Appeals for the Eighth Circuit.[13]

In 1885 and 1888 the City of Denver passed ordinances permitting the Denver Tramway Corporation to operate a street railway on a five cent fare basis, but the ordinances set no time for the expiration of this grant. In 1902 the Constitution of the State was amended to include a home rule provision for the City and County of Denver. Under this provision, the City amended its charter to contain the following clause: "All power to regulate charges for services for public utility corporations is hereby reserved to the people, to be exercised by them in the manner herein provided for initiating an ordinance." In 1906 a franchise was granted to the Corporation to operate the street railways for twenty years on a five cent fare basis. In 1918 and

[13] No. 257—*Denver v. Denver Tramway Co.* October 15, 1928.

1919 the City Council passed ordinances permitting the company to charge six cents, as temporary relief because of increased operating expenses during the war.

The company, though accepting the franchise of 1906, contended that it enjoyed a perpetual franchise under the ordinances of 1885 and 1888, that the fares specified in those ordinances were not contracts and were unreasonable, and that the franchise of 1906 was void because of the existence of the prior ordinances.

The City argued that the ordinances of 1885 and 1888 could not be considered perpetual, because of the provision in the State Constitution at the time of their enactment, "that no * * * law, making any irrevocable grant of special privilege, franchise or immunities shall be passed by the General Assembly."

The U. S. District Court held in favor of the Corporation and enjoined the City from interfering with the corporation's increased fares. This decision was affirmed by the Circuit Court of Appeals for the Eighth Circuit and the Supreme Court refused to review the case.

In Los Angeles, the street railway company petitioned for an increase in fares, maintaining that its contract with the City for fixed rates was not authorized under the California Constitution, and that therefore, it was entitled to charge reasonable fares. The Railroad Commission of California re-

fused to raise the fares, and the company brought suit in the Federal District Court to set aside the order of the Commission. The court granted the injunction on the theory that the state constitution provided that no special privileges or immunities shall ever be granted which may not be altered or revoked by the Legislature, and that therefore the City had no power to contract for the fixed rates in question. The City and the Commission petitioned the Supreme Court for a stay of the mandate, but this was denied. The case is now before the Supreme Court on appeal.[14]

Street Railway May Operate Without Franchise

An interesting case, involving the operations of street railways, came under an entirely different question: namely, whether a street railway operating in interstate commerce may continue to operate over the streets of a municipality after its franchise has expired. This was the case of the *Village of Lowellville, Ohio,* v. *East End Traction Company.*[15] The Company operated over the streets of the municipality and afterwards extended its operations into the State of Pennsylvania. When its franchise in the Village of Lowellville expired, the Traction Company was operating under a certificate of convenience and necessity issued by the Interstate

[14] No. 801—*California Railway Commission v. Los Angeles Railway Corporation.* (Case still pending).

[15] No. 665—*Village of Lowellville, Ohio v. East End Traction Co.* March 5, 1929.

Commerce Commission. The Village then instituted proceedings in the Ohio Courts to compel the Traction Company to cease its operations and to remove its tracks from the streets. The Ohio Courts held that the Traction Company could not do that without a certificate from the Interstate Commerce Commission, and that since the subject matter was entirely within the jurisdiction of that Commission, the Village could not compel the Company to remove the tracks or to require it to operate under its franchise. The Village of Lowellville petitioned the Supreme Court to review this decision, but the petition was denied.

Rates for Natural Gas

A number of cases disposed of by the Supreme Court during the past term involved rates chargeable by public utilities other than street railways. The most important of these were two cases involving the reasonableness of rates on natural gas in West Virginia and Kentucky.[16] Both cases were brought before the Supreme Court by the United Fuel Gas Company. Both involved the validity of the rate making orders of the Public Service Commissions of the respective states. The Company questioned the sufficiency of the value allowed to it for leaseholds and for going-concern value. It complained that the Commissions did not make suf-

[16] No. 1—*United Fuel Gas Co. v. Railroad Commission of Kentucky*, Jan. 2, 1929, and No. 4—*United Fuel Gas Co. v. Public Service Commission of West Virginia*. Jan. 2, 1929.

ficient allowances for depletion and depreciation, and that the Commissions erroneously took into consideration the earnings of the Company from sources other than the sale of natural gas, in determining the fair rate of return.

As to the last question, the Court held that the Commissions were right in taking into consideration the earnings from extraction of gasoline from the natural gas. Previously, the Company extracted the gasoline and the Commission (in West Virginia) attributed 50% of the earnings to the natural gas plant. Later, the Company created a subsidiary for this purpose, but the Commission continued to include 50% of the earnings from this source, as coming from the natural gas plant.

As to the questions of confiscation, based on insufficient valuation of the Company's properties, the Court, after reviewing the various items attacked, held that the Company had not supported its contentions by sufficient proof:

> "The burden of proving the value of property on which they are constitutionally entitled to earn a fair return rests upon the appellants and, to justify judicial interference with the action of state officers in fixing the rate assailed, must be supported by clear and convincing evidence. * * * On the record as made, appellants have failed to present any convincing evidence of value of their gas field which would enable us to assign

to it any greater value than that which they appear to have assigned to it on their books."

Bus Line Competition

The problem of the automobile as a growing common carrier of passengers and freight figured prominently in several cases. The Railroad Commission of West Virginia and a number of bus lines contended that the decision of the Supreme Court of Appeals of the State was contrary to the equal protection clause of the Constitution, when it set aside the order of the Commission granting certificates of convenience and necessity to the bus lines for operation in competition with a railroad. In that case, the railroad likewise applied for a permit to operate bus lines, and the State court held that when an existing carrier is one of several applicants, the Commission should give preference to the carrier. This decision the Court based on the public policy in the state to give established public utilities reasonable protection against detrimental competition. On appeal, the Supreme Court dismissed the case as not involving a substantial federal question.[17]

In Ohio, a certificate of convenience and necessity had been issued to a partnership for the purpose of operating a bus line. After the partners had sold their interest in the partnership, the Public Utilities Commission of Ohio revoked the certificate

[17] No. 55—*State Road Commission of West Virginia et al. v. Monongahela West Penn Public Service Co. et al.* Oct. 29, 1928.

for the reason that the purchasers had not applied to the Commission for permission to buy the partnership interests. The Supreme Court of Ohio affirmed the order of the Commission, and the Supreme Court of the United States dismissed the case for lack of jurisdiction.[18]

Cooperative Gins May Not Be Favored

In Oklahoma cotton gins have by statute been made public utilities, and no one may operate a cotton gin unless he has first obtained a license from the Corporation Commission of the State, upon a showing of public necessity. The statute, however, was amended in 1925, exempting cooperative gins from this requirement. The Supreme Court held this amendment repugnant to the equal protection clause of the Constitution and therefore invalid.[19]

It was maintained by the Corporation Commission that the complainant, an owner of a cotton gin, who had obtained a certificate, had no right to object to the Commission's granting a license to a cooperative gin without a showing of public necessity. The Supreme Court held, however, that one who had been subjected to this requirement, had a right to be free from the competition of those who were not subjected to the same requirements. In other words, that the equal protection clause applies not only to arbitrary discrimination against one's

[18] No. 253—*G. A. Oyster et al. v. Public Utilities Commission of Ohio.* Oct. 15, 1928.

[19] No. 60—*W. A. Frost v. Corporation Commission of Oklahoma,* Feb. 18, 1929.

rights, but also to discrimination in the granting of privileges.

The dissenting opinion, delivered by Justice Brandeis and concurred in by Justices Holmes and Stone, justified the exemption of the cooperative gins from the requirement of showing public necessity. Justice Brandeis discussed at length the development of cooperatives and the laws of Congress and of the various states framed specifically for the incorporation and encouragement of farmers' cooperative enterprises. He pointed out that now only two states lack laws making specific provision for farmers' cooperatives. He went fully into the conditions of cotton ginning in Oklahoma and the history of the cooperative movement in the state showing that the legislation in question was aimed to correct certain evils in that industry. He stressed the fact that there is a fundamental difference between the objects and purposes of the farmers' cooperative associations and the privately owned cotton gins; that the two do not belong to the same class of economic units and that therefore their distinction under the Cotton Gin Law was not without reason. In describing the cooperative associations Justice Brandeis said:

> "The farmers seek * * * to secure a more efficient system of production and distribution and a more equitable allocation of benefits. But this is not their only purpose. Besides promoting the financial advantage of the participating farmers, they seek through cooperation to socialize their

interests—to require an equitable assumption of responsibilities while assuring an equitable distribution of benefits. Their aim is economic democracy on lines of liberty, equality and fraternity. To accomplish these objectives, both types of cooperative corporations (stock and nonstock) provide for excluding capitalist control. As means to this end, both provide for restriction of voting privileges, for curtailment of return on capital and for distribution of gains or savings through patronage dividends or equivalent devices."

On the other hand, he pointed out that the evils which led to the enactment of this law in Oklahoma were that extortionate prices were charged to the farmer by the commercial gins, a large percentage of which was controlled by cotton seed oil mills; that these made their service as ginners incidental to that as crushers of seed, and that thereby they were enabled to secure the seed at less than its value. He concluded:

"The fact that, despite the regulatory provisions of the Public Service law, a public utility is permitted to earn big profits indicates that something more than rate regulation may be needed for the protection of the farmers. Certainly, it cannot be said that the legislature could not reasonably believe that cooperative ginning might afford a corrective for rates believed to be extortionate."

IV

INSURANCE QUESTIONS

The insurance problems which we shall consider may be grouped into those dealing with the regulation of insurance companies and those concerned with the interpretation of insurance contracts. Among the latter we find a variety of insurance presented, including accident, life and war risk insurance, burglary and theft insurance, and finally, problems of marine insurance.

Toward the end of the 1928 Term, two important cases came to the Supreme Court involving the validity of insurance rates ordered by the Superintendents of Insurance of the States of Missouri and Kansas. The Superintendent of Insurance of Missouri had ordered a reduction of ten per cent in the rates charged by the fire insurance companies. In Kansas the Superintendent of Insurance ordered a general revision of rates based on the income of the insurance companies, including that derived from sources outside of the state and from sources other than insurance premiums in Kansas.

These cases were before the Supreme Court in the preceding year, (October Term, 1927) when the highest courts of the respective states had sustained the orders of the Superintendents of Insurance. Over 150 insurance companies were the complainants in each of these cases, including all the insur-

ance companies doing business in the states. The Missouri case came to the Supreme Court of the United States on a writ of error,[1] but the Supreme Court, speaking through Mr. Justice Butler, dismissed the writ for lack of a substantial federal question, holding that while the Fourteenth Amendment prohibits the states from requiring the insurance companies to charge rates which are unreasonable and confiscatory, the Amendment is not a guaranty against free competition; that while each of the insurance companies could complain that the rates ordered were confiscatory as to it, these insurance companies could not combine and claim that the rates were confiscatory as to all of them.

Then came the Kansas case on a petition to review the decision of the Supreme Court of that State. The insurance companies here argued that their case was different from the Missouri case because under any theory, the rates prescribed were confiscatory as to each and all of them. The Supreme Court, however, declined to review the case.[2]

The effect of these decisions on the law relating to due process in rate making can hardly be minimized. Thus far, however, the practical effect of these decisions has been to break up the two cases into more than 300 cases which were filed in the federal District Courts in Kansas and Missouri to enjoin the Superintendents of the respective states from enforcing their orders. Each complaint con-

1 *Aetna Insurance Co., et al. v. Hyde*, 275 U. S. 440.
2 *Aetna Insurance Co., et al. v. Baker*, 276 U. S. 628.

tained the same allegations as the others. In each case, the same answer was filed, and in both states one of the cases was used as a test case for all the others.

The federal court in Missouri sustained the contentions of the Superintendent and denied an interlocutory injunction sought by the insurance company. This case [3] is now pending on direct appeal before the Supreme Court.

In Kansas, the test case has met with some serious jurisdictional difficulties. When the insurance companies petitioned for an order to restrain the Superintendent of Insurance, they also petitioned the presiding judge to convene a three judge court. Seeing that the judge was favorably inclined to their point of view, the companies did not press their application for a three judge court. The Superintendent of Insurance, however, insisted on a three judge court, and the case resolved itself into the question whether a state officer, who is a defendant in a suit brought to restrain him from enforcing a state law, or an administrative order, has a right to have the issues determined by a three judge court, merely because the complainant had applied for one. The presiding judge overruled the motion of the Superintendent, who then applied to the Supreme Court for a writ of mandamus [4] to compel him to convene a statutory three judge court.

[3] No. 921—*National Insurance Co. v. Joseph B. Thompson.* (Case still pending).

[4] No. 20 Original—(October Term, 1929) *Ex Parte: Chas. F. Hobbs, et al.* (Case still pending).

An important case [5] challenged the validity of the New York Insurance Law, as applied to foreign insurance companies. The Superintendent of Insurance of the State undertook to regulate the investments of a New Jersey corporation doing insurance business in New York. He required that no more than fifty per cent of the surplus of the New Jersey company be invested in securities of other insurance companies.

The New Jersey company claimed that the Law, as applied, was unconstitutional, maintaining that the State of New York had no power to regulate the investments of a foreign company, except to the extent that the investments appertained exclusively to business done in New York.

The Superintendent of Insurance, on the other hand, took the position that it is within the police power of the state to regulate and control the investments of all insurance companies doing business in the state; that the investments of the New Jersey company were of a character forbidden to domestic companies; that under the law the Superintendent may exercise the same powers with reference to foreign as to domestic companies, and that therefore his refusal to issue a certificate to the New Jersey company, unless it reduced its investments in other insurance companies, was within the proper exercise of his powers.

[5] No. 376—*Firemen's Insurance Co. of Newark v. Beha.* January 14, 1929.

The statutory court in New York where suit was brought to enjoin the Superintendent from enforcing his order, refused an interlocutory injunction, and this decision was affirmed by the Supreme Court.

Law Limiting Insurance Agents

The state of Oregon passed a law imposing a license fee of $500 on insurance companies for each additional agent, in excess of two, maintained by them in a city of 50,000 or more. An applicant was refused an insurance agent's license because his company already had two agents in the city, and had not paid the additional license fee of $500. This ruling was sustained by the Oregon courts, and the applicant appealed to the Supreme Court.[6] He maintained that the additional license fee is not a reasonable regulation of the insurance companies, but an unreasonable limitation upon his own right to engage in the lawful occupation of insurance agent. He complained that the law of Oregon is contrary to the provision in the Constitution, as denying him the equal privileges and immunities granted by the state to other citizens. This case is still pending.

A case which involves neither the regulations of insurance companies nor interpretations of insurance contracts, but which is likely to have an effect on both, came from the state of Nebraska. The question involved is the constitutionality of a rule of

[6] No. 590—*Karl von Hebring v. Lee.* (Case still pending).

the Supreme Court of Nebraska, permitting a plaintiff to inquire of a defendant on cross examination, whether he carried liability insurance. The case arose out of an automobile accident.

In most states, the contrary ruling obtains, namely, rules against the introduction of evidence showing that the defendant was insured. The reason for this is that in an action where the insurance company is not a party, it is felt that the jury might be unduly influenced by the consideration that judgment in favor of the plaintiff would work no hardship on the defendant, since the insurance company can well afford to pay the loss and distribute it among the numerous policy holders or stockholders. On the other hand, in some states, laws were passed making liability insurance companies liable directly to the plaintiff in cases arising out of automobile accidents.

In Nebraska, the view taken is that when a defendant is protected by liability insurance, this circumstance may have had an effect on the amount of care which the insured exercised in operating the car and in avoiding the accident. The insurance company, in this case, appealed to the Supreme Court, maintaining that it was denied due process, because its rights were jeopardized without being made a party to the proceedings. This appeal is now pending before the Court.[7]

[7] No. 897—*James S. Harrington et al. v. James Sloan.* While this book was in press, the appeal was dismissed for lack of a substantial federal question in the case. October 28, 1929.

Accident and Life Insurance

The largest class of cases constituting actions under insurance policies related to accident and life insurance. About fifty per cent of these cases involved the applications of suicide clauses in the policies.

In a case [8] which came from California, the question was raised, what was the effective date of the policy, in order to determine whether the insured had committed suicide within the first policy year, in which case the life insurance company would not be liable on the policy. Three dates were considered: August 2, 1924, when the insured made his application and took his medical examination; August 14, when the policy was issued, and August 26th, when it was delivered to the insured. He committed suicide on August 9, 1925. Contrary to the contentions of the insurance company, the Circuit Court of Appeals for the Ninth Circuit held that August 2nd was the effective date, because at the time of his application and medical examination, the insured gave the agent of the company a promissory note for his first premium, for which the agent issued a "conditional receipt," and the application contained a clause that if "such premium is paid in advance in cash * * * the insurance shall be in force when an examination satisfactory to the company has been made". The Circuit Court held

[8] No. 334—*Northern Life Insurance Co. v. Schwartz.* October 22, 1928.

that by accepting the note, the company "waived" payment of the premium in cash. The insurance company petitioned the Supreme Court to review that decision, but the petition was denied.

A related case [9] involved the interpretation of "waiver of premiums" in a life insurance policy. This policy provided that should the insured become totally disabled and furnish satisfactory proof of the disability, the Company would waive the payment of premiums "thereafter becoming due." The question arose whether the waiver of the premiums started from the time of disability, or from the time of the proof. In this case, the insured was totally disabled some time in October, 1926, he died in November, 1926, the Company was notified of the death in December, 1926, and proof of disability was not given until March, 1927. The Company refused payment on the policy on the ground that it had lapsed for non-payment of the premium, but the courts held that the waiver of the premium became effective from the time of the disability, not from the time of the proof thereof.

Several cases turned upon the presumption against suicide. The body of the insured, a Judge of the U. S. District Court, was found in a canal pinned beneath an overturned automobile. In an action under the double indemnity clause of his life insurance policy, the insurance company produced evidence that shortly before his death, the judge

[9] No. 744—*Minnesota Mutual Life Ins. Co. v. James Marshall.* April 15, 1929.

was under an indictment charging him with embezzlement and other crimes. It maintained that these circumstances, together with the position of the overturned car, etc., raised a presumption of suicide, and that the burden was therefore on the beneficiary to overcome that presumption, before recovery could be had under the double indemnity provision in the policy. The lower courts, however, held that the burden of proceeding with the evidence was not shifted. The insurance company petitioned the Supreme Court to review the case,[10] but the petition was denied.

In another case,[11] however, it was shown that the insured had met his death when he unlawfully assaulted another. The evidence introduced by the insurance company was a record of testimony taken at a preliminary examination upon the death of the insured, showing that he was shot by the person whom he had assaulted. The lower courts held that this rebutted the presumption against death resulting from violation of law, and that the burden was then on the beneficiary to show that the death was accidental. This, the courts held, could be done by evidence that the insured was not the aggressor, or that, though he was the aggressor, he could not reasonably have anticipated that he would be killed. The Supreme Court denied the beneficiary's petition to review that decision.

[10] No. 756—*New York Life Insurance Co. v. Ross.* April 15, 1929.

[11] No. 853—*Theodosia Smith v. Mutual Life Insurance Company.* May 27, 1929.

The meaning of the words "external and purely accidental event" in an accident insurance policy was brought into question in a suit[12] filed by the beneficiary of a trained nurse to recover under the policy. The nurse had been called to treat a case of erysipelas, and while engaged in her work, she contracted septicaemia or blood poisoning, from which she died. The evidence showed that the germ of blood poisoning had gained access to the nurse's system, through an opening in her index finger, and that this opening had been caused by an antiseptic solution. The lower courts instructed the jury, over the objection of the insurance company, that if they believed the opening occurred as a result of the use of some antiseptic solution, which in the ordinary course of events would not have occurred, then they should find that the death resulted from an "external and purely accidental event". The company maintained that this instruction was erroneous, but the decision was affirmed by the Circuit Court of Appeals, and the Supreme Court refused to review the case.

In two cases the outcome of the litigation on life insurance policies depended on the admissibility of evidence. Under the law of Pennsylvania the facts in the State Registrar's certificate of death, issued upon information furnished by the Coroner, constitute prima facie evidence in all the courts. Under the provision of the policy on which the action was

[12] No. 598—*Continental Casualty Company v. Willis.* January 21, 1929.

brought, the beneficiary when making the claim, must attach the death certificate as part of the claim. In this case, the certificate stated that the death was caused by gas asphyxiation, and that the deceased had committed suicide. Two questions of evidence presented themselves: (1) Was the death certificate, attached by the beneficiary, an admission against interest, and (2) was the certificate prima facie evidence as to the cause of the death.

The beneficiary argued that since the insurance company set up the defense of suicide, the burden was upon it to show that fact; but the courts held [13] that the certificate constituted prima facie evidence, and that the burden was on the beneficiary to controvert the fact stated in the certificate.

The second case [14] came from Iowa, where the rule is that information obtained by a physician in the course of his professional conduct is privileged and is not admissible in evidence. In this case, action was brought on an accident insurance policy in which it was claimed that the insured had died of acute toxic poisoning. The insurance company offered to rebut this evidence by a physician who had performed an autopsy on the deceased. This evidence was excluded by the trial court, on the ground that the witness had performed the autopsy as an assistant to the attending physician of the deceased.

[13] No. 634—*Anna M. Jensen v. Continental Insurance Company*, April 8, 1929.

[14] No. 418—*Freda Bergeron v. Travelers' Insurance Co.* Oct. 22, 1928.

This ruling was reversed by the Circuit Court of Appeals. The beneficiary petitioned the Supreme Court to review the case, claiming that the Circuit Court of Appeals misapplied the Iowa law, but the Supreme Court declined to go into the matter.

War Risk Insurance

Closely related to accident and life insurance policies are the policies of war risk insurance. Here the Supreme Court sustained [15] the Government's contention that the decisions of the Director of the Veterans' Bureau pertaining to Adjusted Service Certificates are final and conclusive, and that the U. S. Courts have no jurisdiction in cases arising against the Government out of these certificates, unless the decision of the Veterans' Bureau is wholly without evidence to support it or is clearly arbitrary or is based entirely on a question of law.

In one case,[16] however, the Veterans' Bureau dropped a policy for non-payment of premiums, although the non-payment resulted through the fact that the Bureau failed to answer the insured's inquiries as to the continuance of the policy. The Circuit Court of Appeals for the Third Circuit held in favor of the Government. The case was brought by the beneficiary to the Supreme Court, where the action of the Third Circuit was reversed without opinion, upon confession of error by the Solicitor General.

[15] No. 104—*U. S. v. Williams.* January 2, 1929.

[16] No. 151—*John Winthrop Loveland v. U. S.* January 14, 1929.

In an action brought against the Government on a war risk insurance policy, the lower courts allowed the beneficiary to recover the amount of insurance plus costs and interest. This was reversed [17] by the Supreme Court, without an opinion, holding that costs and interest were not taxable against the Government.

Theft

In Chicago, as in most other places, it is not safe to put a trunk containing diamonds on a truck and leave the truck unattended. This was the experience of a diamond dealer in New York whose salesman in Chicago shipped diamonds by a transfer company to the railroad station, whence the diamonds were to be shipped to another city. The trunk was stolen from the truck while the driver had left it, and the diamond dealer brought action to recover under an "All Risks' Jewelers' Block Policy". The policy provided, however, that the goods insured, when not personally carried, must be forwarded by registered post. For that reason the jeweler could not recover, the Circuit Court of Appeals for the Second Circuit held, and the Supreme Court declined to disturb that decision.[18]

Fire Insurance

Various provisions of fire insurance contracts were disposed of by the Court. The most impor-

[17] No. 290—*U. S. v. Woolen.* February 18, 1929.

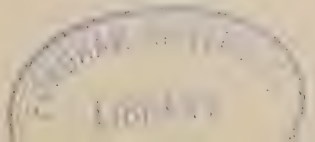
[18] No. 181—*Jacob Schliff v. Eagle & Star British Dominions Insurance Company.* October 8, 1928.

tant of these was the case questioning the constitutionality of Nebraska Fire Insurance law.[19] This law provides that in an action brought under a fire insurance policy, the amount of the fire insurance shall be conclusive evidence as to the value of the property insured, if the same is destroyed without criminal fault on the part of the owner. In an action brought, the insurance company maintained that the property insured was worth only half the amount of the insurance, and that the owner had intended to defraud the company. The lower courts held the amount of insurance conclusive evidence as to the value of the property. The insurance company petitioned the Supreme Court to review the decision, maintaining that in so far as the state precluded a defense on account of fraud, the statute was without due process, but the Supreme Court declined to review the case.

During the 1927 term, the Supreme Court denied a review in a case in which the lower courts held that recovery could not be had under a policy insuring liquor in bond, because in that case, the owner of the liquor (which was good Bourbon whiskey) had no permit to use it or sell it, and therefore the liquor had no value to him.[20] This year, the Circuit Court of Appeals for the Ninth Circuit rendered a similar decision holding that one who lawfully acquired liquor under a permit issued

[19] No. 201—*U. S. Fire Insurance Company v. Sullivan.* October 8, 1928.

[20] *Gonch v. Republic Storage Co.*, 275 U. S. 567.



under the Volstead Act, ceased to have an insurable interest in the liquor after his license was revoked. The owner of the liquor petitioned the Supreme Court to review the case,[21] maintaining that if the revocation of the permit meant the loss of his insurable interest in the liquor, then this constituted a taking of property without just compensation; that the revocation was invalid, and that therefore it should follow, that his insurable interest in the liquor was not destroyed. The Supreme Court, however, declined to go into the matter.

When a fire is caused by sparks emitted from a locomotive, is it necessary to prove that the railroad was negligent in addition to proving that the fire was caused by the sparks? This question arose in the state of Washington, where an insurance company, after having paid the loss sustained by the insured, sued the railroad to recover the amount of the insurance. The evidence showed that the fire was caused by the railroad's locomotive, but judgment was rendered in favor of the railroad because the insurance company failed to prove negligence on the part of the railroad. The Supreme Court granted a review,[22] in the case on the contention of the insurance company that the emission of sparks from a locomotive is a circumstance which is in itself evidence of negligence. This case is still pending.

[21] No. 615—*Clemente Ariasi v. Orient Insurance Co.* February 25, 1929.

[22] No. 622—*General Insurance Co. v. Northern Pacific Railway Company.* (Case still pending).

Marine Insurance

The most important of the marine insurance cases decided by the Supreme Court during the past term was one [23] in which the Court held that, where cargo insured under a valued policy suffers from a peril insured against, through being assessed a general average contribution, based on a contributory value which is in excess of the agreed policy value, the recovery of the insured is limited to an amount based on the proportion of the loss which the amount of the policy bears to the contributory value. In this case, a policy of war risk insurance in the amount of $27,000 was issued on a cargo which was valued in the policy at $212,000. This made the insurance about one eighth of the cargo risk. The steamship was torpedoed by a German submarine and was seriously damaged, but after making various extraordinary sacrifices, the voyage was completed and the cargo was delivered.

After a general average was stated, the cargo was assessed $49,000, which was its proper share based on a contributory value of $417,000, the actual value of the cargo saved. The owner of the cargo, after paying the general average contribution, asked for indemnity from the insurance company for the proportion which the underwriting bore to the agreed policy value, namely one eighth. The insurance company claimed that since the contributory value

[23] No. 506—*Gulf Refining Co. v. Atlantic Mutual Insurance Co.* May 27, 1929.

exceeded the agreed policy value, it should pay only the portion of the loss which the underwriting bore to the contributory value, or about one sixteenth. The Supreme Court sustained the insurance company's contention on the theory that under such circumstances, the insured is a coinsurer to the value of the cargo in excess of the agreed policy value, and therefore should bear that portion of the loss.

V

BANKING CASES

The constitutionality of the McFadden Banking Act and the Georgia Banking Law were the outstand banking questions before the Supreme Court. A considerable number of cases involved taxation of national banks, the civil and criminal liability of officers and directors and the double liability of stockholders of Joint Stock Land Banks.

National Banks Must Qualify As Executors

Under Section 3 of the McFadden Banking Act,[1] whenever a National Bank consolidates with a state bank or trust company, all the rights, powers and privileges enjoyed by the state bank may be exercised by the consolidated bank. Among these powers is the right to act as executor of an estate. The question arose in Massachusetts, whether this provision means that the consolidated national bank becomes an executor by virtue of the consolidation, or whether the bank must first qualify as an executor under the state law.

This problem came up when the Fitchburg Bank and Trust Co., a state bank, and the Merchants National Bank of Worcester, a national bank, consolidated and formed the Worcester County National Bank. The Trust Company, at the time of

[1] Act of Feb. 25, 1927, Ch. 191, Sec. 3, 44 Stat. 1224.

the consolidation, acted as executor of an estate. After the consolidation the report of the executor was filed by the consolidated bank. The Probate Court refused to accept the report, for the reason that the consolidated bank had never been appointed as executor. It held that under the law, the consolidated bank is not empowered to act as executor, unless it also qualifies under the state law; furthermore, that if the McFadden Act permits the bank to act as executor without appointment by the Probate Court, the Act is unconstitutional as usurping the powers reserved to the states. This decision was upheld by the higher courts of Massachusetts.

Upon this question, the National Bank appealed to the Supreme Court. The Comptroller of the Currency and the Federal Reserve Board filed briefs as *amici curiae*. They argued that Congress had the power to vest consolidated national banks with all the powers exercised by the state banks entering into the consolidations; that the evident purpose was to protect such banks against state created competition; that the act of the State of Massachusetts in depriving the consolidated bank from continuing to act as executor was tantamount to penalizing the bank for entering into the consolidation authorized by Congress; and that furthermore when the state court authorized the state bank to act as executor, it must be held to have done so in recognition of the right of the state bank to consolidate with a national bank under the McFadden Act.

The Attorney General of Massachusetts argued in opposition that Congress intended the consolidated national bank to succeed the state bank, as executor, only in accordance with the rules of state law applicable to such appointments; that Congress did not intend to authorize consolidated national banks to act as executors without a new appointment by the Probate Court, where the state law requires such new appointment; and that if it is held that such was not the intention, then the Act must be held unconstitutional, because the control and administration of the estates of deceased persons is one of the powers reserved to the states by the Federal Constitution. The Supreme Court of the United States affirmed the decision of the State Courts,[2] but remanded the case for further proceedings to give the consolidated bank an opportunity to qualify as executor.

National Bank Retains Lien

The consolidations of national and state banks gave rise to another controversy, in which it was held that the rights of the state bank had been taken over by the national bank. In Oklahoma, if a stockholder of a state bank is indebted to the bank, the latter has a lien on the stock to the amount of the indebtedness. The question arose whether the lien is retained, if the state bank is converted into, or is consolidated with, a national bank. The Supreme

2 No. 469—*Ex Parte: Worcester County National Bank of Worcester.* May 13, 1929.

Court of the State held that the national bank retained the lien, and the Supreme Court of the United States denied the stockholder's petition to review the case.[3]

Taxation of National Banks

It has long been established that national banks are instrumentalities of the Federal Government and therefore may not be taxed by the states, except as permitted by Congress. The National Banking Act specifically provides that, in imposing taxes on the shares of stock of the national banks, or on dividends derived from the shares, or on the income of the banking associations, the states may not impose a greater burden of taxation than is imposed on other moneys or credits competing with national banks.

Since the passage of the Act numerous cases have come to the Supreme Court in which the banks complained of discrimination by the states. During the past term, an appeal came from the decision of the Supreme Court of South Dakota, in which the national bank attacked the state statute, as putting national banks at a disadvantage.[4]

The particular complaint here was that the rate of taxation on national bank shares was greater than the rate on money, credits, real estate, mortgages and contracts for deeds in the state, a substantial

[3] No. 328—*S. A. Apple et al. v. American National Bank of Ardmore, Okla.* October 22, 1928.

[4] No. 424—*Security National Bank, Watertown, S. D. v. County Commissioners of Codington County, S. D.* November 26, 1928.

amount of which was used in competition with the national banks. The bank paid the tax under protest and then applied for a refund, which was denied. The state courts dismissed the complaint, because in applying for the refund the bank did not specify its reasons in the manner provided by the state statute. The Bank appealed to the Supreme Court, but the appeal was dismissed for lack of jurisdiction, since the decision of the State Court was based on a non-federal ground which was sufficient to support the judgment.

Since, strictly speaking, the taxes imposed on national bank shares are imposed on the shareholders and not on the bank itself, it was maintained by the taxing authorities in Kansas, that a national bank has no standing in a suit brought to recover such taxes paid under protest, that the action should be brought by the shareholders themselves, and not by the bank. The Circuit Court of Appeals held that the national bank was the proper plaintiff in the case, and the Supreme Court refused to go into the matter.[5]

Criminal Liability of Directors

The provision in the Banking Law of Georgia that, whenever a state bank becomes insolvent, the President and Directors shall be presumed to have fraudulently caused the insolvency, was held to be violative of the due process clause of the Federal

[5] No. 189—*Paul T. McFarland v. Central National Bank.* October 8, 1928.

Constitution. This law, together with prescribing severe penalties for fraudulently causing the insolvency of a bank, defined insolvency as follows:

> "A bank shall be deemed insolvent, first, when it cannot meet its liabilities as they become due in the regular course of business; second, when the actual cash market value of its assets is insufficient to pay its liabilities to depositors and other creditors; third, when its reserve shall fall under the amount herein required and it shall fail to make good such reserve within thirty (30) days after being required to do so by the Superintendent of Banks."

Under this law, W. D. Manley of Atlanta, was convicted and sentenced to penal servitude for ten years, because the bank of which he was President became insolvent. The Supreme Court of the United States held that in view of the above provisions in the law, and in view of economic facts, there is no reasonable connection between the presumption of fraud and the fact of insolvency. One of the provisions stressed by the Court is that in Georgia, banks are permitted to make loans up to 85% of the deposits. Unforseen demands on a bank may cause its insolvency, though the president and directors may have exercised utmost good faith. Under such circumstances, the Court held, "inference of crime and guilt may not reasonably be drawn from mere inability to pay demand deposits and other debts as they mature".[6]

[6] No. 429—*W. D. Manley v. State of Georgia.* February 18, 1929.

The decision in this case goes far beyond its application to banking cases. Within the past number of years, statutes were enacted by the federal government and by the states, in which the burden of proof is shifted on the defendants. The rule laid down by the Supreme Court in this Georgia Banking Case is, that "mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty and property".

In several cases which came to the Court, officers of banks were convicted of such offenses as making false entries in the books of a national bank, misapplying funds of national banks, and conspiracy to violate the Farm Loan Bank Act.

One of these cases [7] raised an interesting problem under the Sixth Amendment of the Constitution, which provides that an accused must be tried in the District where the offense was committed, which District shall previously have been ascertained by law. In this case, the offense charged was the making of false entries in the books of a national bank, situated in Tulsa, Oklahoma. These entries were alleged to have been made in 1923, when Tulsa was in the Eastern District of Oklahoma.

The indictment was returned in 1925, when Tulsa became part of the newly organized Northern District. The defendants contended that they should have been tried in the new Northern District, rather than in the old Eastern District. The Supreme Court, however, interpreted the Act of Congress

[7] No. 182—*Lewis v. United States.* March 5, 1929.

creating the new District, as permitting trials in the old District for offenses already committed therein at the time of the passage of the Act.

The prosecution[8] for misapplication of funds came to the Supreme Court on the sufficiency of evidence to support the conviction. The President and Director of the Northwestern National Bank of Portland, Oregon, was indicted under the National Banking Act on the charge of misapplying the funds of the bank by honoring worthless checks and drafts approximating $700,000. At the trial, which resulted in his conviction, he claimed the court erred in denying his motions to set aside the indictment, and for a directed verdict, and in refusing to instruct the jury covering the defendant's knowledge of the worthlessness of the checks and the insolvency of the drawer of the checks. He was sentenced to imprisonment for five years and to payment of a fine of $1,000. On appeal, the Circuit Court of Appeals sustained the judgment of the District Court, and the Supreme Court declined to go into the matter.

In the case[9] charging conspiracy to violate the Federal Farm Loan Act, the defendant applied to the Circuit Court of Appeals for a writ of mandamus to compel the District Court to sign a bill of exceptions. The overt acts alleged in the prosecution consisted of making false financial statements. The trial lasted for a long time, and involved a large mass of testimony. At the end of the trial,

[8] No. 717—*Emery Olmstead v. United States.* April 10, 1929.

[9] No. 854—*W. E. Richardson v. United States.* May 13, 1929.

the defendants prepared their bill of exceptions which comprised over 300 pages. The District Attorney disagreed with certain portions of the bill of exceptions, and amendments were prepared by the defendants' counsel. In their petition for a writ of mandamus, the defendants complained that the trial court required the preparation of a new Bill of Exceptions which should include much of the testimony and remarks of both counsel and the judge. This, the defendants claimed, imposed a great burden on them and rendered impossible the making of a new bill of exceptions within the time allowed, and yet the trial court refused to extend the time. The writ of mandamus was denied, because the signing of a bill of exceptions is a matter within the discretion of the trial court. The Supreme Court declined to disturb that decision.

Civil Liability of Directors

Officers and directors of banks were also held liable in damages for insolvency or financial embarrassment caused through negligence or mismanagement. Where directors failed to require an indemnity bond from the bank cashier, and the latter absconded with funds, the directors were held liable, and that, irrespective of whether any attempt had been made by the receiver to collect the double liability of the stockholders.[10] In this connection, it was also held that the mere acceptance of the direc-

[10] No. 680—*P. S. Perkins et al. v. Joseph A. Gamble.* February 25, 1929.

torship of a bank made the director liable; the fact that during the time he had been physically or mentally unable to attend to his duties as director, was held to be no excuse.[11] These decisions, rendered by the Circuit Court of Appeals, were not reviewed by the Supreme Court.

Stockholders Liability

The assessment of double liability on stockholders of Joint Stock Land Banks was also considered this term.[12] It was maintained that the Farm Loan Board has no power to assess the stockholders' liability, and that the Receiver of such bank may not bring action to recover on the assessment. The Receiver argued in opposition, that the powers of the Farm Loan Board were analogous to those of the Comptroller of the Currency over national banks. The Circuit Court of Appeals upheld the action brought by the Receiver, but the Supreme Court granted a writ of certiorari. This case will be argued next term.

Liability of Banks

The liability of banks for unauthorized acts of its officers was brought into question in several important controversies. It was maintained that the con-

[11] No. 644—*George D. Brown, Administrator v. Joseph A. Gamble, Receiver.* February 25, 1929.

[12] No. 711—*J. R. Wheeler v. Howard Greene, Receiver, Bankers Joint Stock Land Bank of Milwaukee, Wisc.* While the book was in press, the case was decided. The Court reversed the holding of the Circuit Court of Appeals. Nov. 4, 1929.

tracts entered into or loans made were in excess of the authority conferred on the banks or their agents, for which the banks were therefore not liable. It was held, however, that where a bank holds one out as its cashier, it is estopped from denying his authority to issue certificates of deposits, and the bank was held liable on the certificate in question. The Supreme Court declined to review this case.[13]

On the other hand, it was held by the Supreme Court of Arizona that where a national bank enters into contracts for loans in excess of that allowed by law, the contracts are void and unenforceable. The Supreme Court granted a writ of certiorari in the case, which will be argued during the next term of Court.[14]

[13] No. 804—*Peoples Bank of Keyser, W. Va. v. International Finance Corporation.* April 29, 1929.

[14] No. 739—*Anglo & London Paris National Bank of San Francisco v. Consolidated National Bank of Tucson.* (Case still pending).

VI

FEDERAL TAXATION

About ten per cent of the cases docketed in the Supreme Court during the past term involved questions of federal taxation.[1] The litigation touched many provisions of the Internal Revenue Acts enacted since 1916. The constitutionality of the Federal Estate Tax was brought into question, as well as that of the Federal Gift Tax, the operation of which had already been limited by the Supreme Court in the preceding year. There was a case, also, which for a time threatened to upset the entire procedure in appeals taken from the Board of Tax Appeals, and which might have thrown into confusion the thousands of cases in which this procedure had been followed.

This case was the *Old Colony Trust Co.* v. *United States*,[2] in which the Circuit Court of Appeals for the First Circuit certified the following question to the Supreme Court: Where an employer pays the taxes of an employee, does that payment of taxes constitute income to the employee, on which the Commissioner may assess additional taxes? Finally

[1] For all the cases involving the questions of Federal Taxation considered by the Supreme Court during the past term, see *U. S. Supreme Court Service*, October Term, 1928, Subject Index, pages XLVI through L.

[2] No. 130—*Old Colony Trust Co. v. Commissioner of Internal Revenue.* June 3, 1929.

the Supreme Court answered that question in the affirmative, but in the course of the argument in the case, the Court raised a series of jurisdictional questions: (1) Is the controversy before the Board of Tax Appeals "a case or controversy" within the meaning of the Constitution; (2) is the provision in the Revenue Act of 1926 allowing an appeal from the Board of Tax Appeals to the Circuit Court of Appeals constitutional; (3) If the provison is constitutional, then does the Circuit Court of Appeals act as a court of original jurisdiction or of appellate jurisdiction; (4) If it acts as a court of original jurisdiction may it certify questions to the Supreme Court, and (5) May it certify questions, the answers to which would be sufficient for the entire disposition of the case.

The reason for the last question was that if the Circuit Court of Appeals acts as a court of original jurisdiction and the question certified by it is sufficient for the entire disposition of the case, then the Circuit Court of Appeals would in effect cause the Supreme Court to act as a court of original jurisdiction in a suit between a private person and the United States, which would be contrary to Article III of the Constitution. The Committee on Federal Taxation of the American Bar Association intervened in the case as *amici curiae* and argued that the provision in the Act was in no way different from the provision in the Federal Trade Commission Act, permitting appeals to the Circuit Court

of Appeals from the orders of the Commission. This was the view finally adopted by the Supreme Court, with Justice McReynolds dissenting.

The procedure in the Board of Tax Appeals itself was attacked in two cases. In one a petition for writ of mandamus was filed in the Courts of the District of Columbia to compel the Board to regard and accept as final a decision of one of the divisions of the Board.[3] The taxpayer maintained that the decision of the division could not be reviewed by the entire Board without giving him notice and an opportunity to be heard. The writ of mandamus was denied by the Court of Appeals of the District of Columbia, and the Supreme Court declined to review the case.

The second case[4] raised the question as to what constitutes a hearing before the Board of Tax Appeals. The taxpayer's complaint was that the evidence in the case was heard by two of the four members constituting a division of the Board; that the opinion in the case was delivered by a member of the division who was not present when the evidence was introduced; that one of the members who heard the evidence dissented from the opinion and that the other member who heard the evidence, was no longer a member of the Board when the opinion was delivered. This case likewise was not reviewed by the Supreme Court.

[3] No. 300—*McCandless v. Board of Tax Appeals.* October 15, 1928.

[4] No. 817—*Redwing Linseed Co. v. Blair.* May 13, 1929.

The finality of the Board's findings as to facts was questioned in a case [5] in which the Circuit Court of Appeals for the Eighth Circuit limited its review to the Board's decisions on questions of law. The taxpayer petitioned the Supreme Court to review the decision, but the Court declined to do so.

Basis for Computing Income

A considerable number of cases were concerned with the basis for computing income taxable under the Revenue Acts. It has already been mentioned that the Supreme Court held that where an employer pays the taxes of an employee, amounts so paid constitute taxable income of the employee. In a companion case,[6] the Court also held that where a lessee under the lease agreement pays the tax of the lessor, that payment of tax is income of the lessor, on which the Commissioner may impose an additional tax.

A controversy under this general subject, which attracted a great deal of interest was *Taft* v. *Bowers*.[7] Here the problem was whether under the Revenue Act of 1921, in computing gain or loss on the sale of stock received by the taxpayer as a gift, the value of the stock must be taken as of the date when the taxpayer received it, or as of the date when the donor acquired it.

[5] No. 912—*Feeders' Supply Co. v. Commissioner of Internal Revenue.* June 3, 1929.

[6] No. 129—*United States v. Boston* & *Maine R. R. Co.* June 3, 1929.

[7] No. 16—*Taft v. Bowers.* February 18, 1929.

During 1921 and 1922, Elizabeth C. Taft received from her father 150 shares of the common stock of the Nash Motor Company. These he had acquired as a bonus in connection with the purchase of preferred stock, and at the time had no market value. The fair market value of the stock on the date of the gift was $42,350. By reason of the stock dividends paid early in 1923 her holdings increased to 750 shares of common stock and 450 shares of preferred stock. During 1923 Miss Taft sold some of the shares for $34,345.30. The portion of the $42,-350 attributable to the shares sold by her was $11,-708.80.

Miss Taft paid the tax on the full amount of the proceeds of the sale of her stock, namely, $34,345.30, claiming, however, that she was entitled to a deduction of $11,708.80, the increase in the value of these shares before she acquired them. This claim for a refund was disallowed by the Commissioner, and suit was brought in the U. S. District Court in New York to recover the amount overpaid. The Court held that the Revenue Act of 1921, in so far as it attempted to tax the increment in the value of the gift which had accrued prior to acquisition by the donee, was unconstitutional.

The Circuit Court of Appeals for the Second Circuit reversed the judgment. The case came to the Supreme Court on a writ of certiorari, and was argued three times. Finally the Court held in favor of the Government, that the value of the stock as

of the time when the donor acquired it, must be taken as the basis for computing the net taxable gain. The Court held that the acquisition of the stock and its transfer as a gift represented a single investment of capital, and when the stock was sold, the increase in its value constituted income from that investment. In other words, when the donee accepted the gift she assumed the position of the donor.

A similar question arose with reference to the sale or disposition of stock inherited. Should the gain upon the sale of such stock be computed on the value of the stock as of the time when the decedent died, or as of the time of the agreement under which the distribution of the estate was made, or as of the time when the stock was transferred to the taxpayer on the books of the corporation? The Court of Claims held that the date governing was the date of the agreement under which the assets of the estate were divided among the various legatees. The taxpayer maintained that the basis should be the value of the stock at the time it was transferred to him on the books of the corporation, but the Supreme Court declined to review the case.[8]

The method for ascertaining the taxable gain on deferred dividend life insurance policies was one of the important problems brought to the Supreme Court. In this case, the life insurance policy was issued in 1899 and surrendered upon its maturity in 1919. The premiums on the policy had been paid

[8] No. 214—*Mattheissen v. U. S.* October 8, 1928.

up in 1908. The taxpayer maintained that the taxable gain on the policy was the difference between the surrender value of the policy in 1919, and its value on March 1, 1913. The Government contended, on the other hand, that the income should be computed on the difference between the surrender value of the policy and the amounts actually paid by the taxpayer. The Circuit Court of Appeals for the Sixth Circuit held in favor of the taxpayer, and its judgment was affirmed by the Supreme Court.[9]

Constitutionality of the Federal Gift Tax

In the preceding year (1927-8) the Federal Gift Tax of 1924 was challenged in three cases. In one[10] case the Court was equally divided on the point whether the gifts were taxable since they were made prior to the effective date of the law, namely, June 2, 1924. In the other two cases, decided after the temporary absence of Justice Sutherland, who did not participate in the decision of the first case, the Court limited the operation of the Federal Gift Tax, holding that the tax on gifts, made prior to the effective date of the Act, was without due process.[11]

In these cases the Court had no occasion to rule whether the tax on gifts made after the passage of the Federal Gift Tax was constitutional. During the past term, it was contended in two cases[12] that

[9] No. 481—*Lucas, Collector v. Alexander.* May 20, 1929.

[10] *Blodgett v. Holden,* 275 U. S. 142.

[11] *Untermeyer v. Anderson,* 276 U. S. 440.

[12] No. 635—*Bromley v. McCaughn, Collector.* No. 678—*O'Connor v. Anderson, Coll.* (Cases still pending.)

the Federal Gift Tax is itself unconstitutional, because it is a direct tax and is not apportioned among the states as required by the Constitution. One of these cases came on certificate from the Circuit Court of Appeals; the other came on a petition for writ of certiorari. In the latter, the Court granted the writ, and the two cases will be argued during the coming term.

Constitutionality of Estate Tax

The constitutionality of the Federal Estate Tax was likewise before the Supreme Court. In one case, the states of Florida, Maryland, Connecticut and Rhode Island joined in and filed briefs as *amici curiae,* arguing that the tax is unconstitutional because it undertakes to regulate and control the taxing powers of the states. They had reference to the provision in the Internal Revenue Act of 1924, in which it is provided that the Federal Estate Tax shall be credited with the amount of any estate, inheritance, legacy or succession taxes actually paid to any state or territory, or the District of Columbia, provided this credit shall not exceed twenty-five per cent of the Federal Estate Tax.

The taxpayer in this case was a resident of Maryland who had paid no estate or inheritance tax to any state or territory or the District of Columbia. He claimed, however, that unless he is allowed a deduction of 25%, the tax must be held unconstitutional as violating the uniformity clause of the Constitution, since deductions are allowed to residents

of some states, but not to residents of others. He further claimed that the section in the Act is unconstitutional since it undertakes to penalize the states for failing to exercise their taxing powers.

The Court of Claims, where the action was brought to recover a portion of the estate tax, upheld the constitutionality of the Act, and the Supreme Court declined to disturb that decision.[13]

The Federal Estate Tax was also attacked as unconstitutional to the extent that it is imposed on the proceeds of life insurance policies, where the proceeds are received by the beneficiaries, and not by the estate.[14] It was maintained that this was a direct tax imposed on beneficiaries, and that it was unconstitutional because not apportioned among the states. The Government argued that this was not a direct tax on property of the beneficiary, but an excise tax; that Congress had power to include proceeds from the policies in the gross estate, though the beneficiary received the proceeds directly from the insurance company, and although the proceeds never came within the control of the executors of the estate. The Court of Claims certified this question to the Supreme Court, which upheld the constitutionality of the tax.

Should the computation of the estate tax depend upon probabilities or upon certainties? In a case from New York property was left by a testator to

[13] No. 393—*Rouse v. United States.* October 22, 1928.

[14] No. 77—*Chase National Bank v. United States.* January 2, 1929.

his wife for life and the remainder for charitable uses. It so happened that, before the executor made his estate tax return, the wife also died. The executor maintained that the value of the life estate of the wife, became thereby fixed and certain. The Supreme Court held, however, that although the wife died before the tax return was made, the life estate must be computed in accordance with mortality and probability tables.[15]

In that case the Government also maintained that no deductions should be allowed for the amounts left for charity, because the charitable uses were contingent upon the possibility that the wife might use up the entire estate, and in accordance with a decision of the Supreme Court the previous term,[16] contingent charitable bequests are not deductible. The specific provision in the will in this case was that the wife shall enjoy the income of the trust and may use such additional funds from the principal of the estate, as may be necessary to continue the comforts she enjoyed. Since it was evident that the income from the estate was more than sufficient to keep her in comfort, the Supreme Court held that these charitable bequests were not contingent and were deductible from the gross estate.

An important decision[17] under the estate tax provisions of the Revenue Acts was rendered by the

[15] No. 267—*Ithaca Trust Co. v. United States.* April 10, 1929.

[16] *Humes v. United States*, 276 U. S. 487.

[17] No. 90—*Reinecke, Collector v. Northern Trust Co.* January 2, 1929.

Supreme Court in which it held that where a person creates a trust during his lifetime, reserving the right to modify it, the trust property is part of the estate and is subject to the federal estate tax. Where, however, a person creates a trust during his lifetime, reserving to himself and to others, jointly, the right to modify or revoke the trust, the property is no longer part of the estate and is not subject to the tax.

Tax on Theatre Tickets

The 1928 tax on theatre tickets was upheld by the Circuit Court of Appeals and the Supreme Court denied a writ in the case.[18] Under the Revenue Act of 1928, the tax on theatre tickets, if sold elsewhere than at places of amusement, is five per cent of the amount in excess of the established price. If, however, the excess is greater than seventy-five cents per ticket, then the tax is fifty per cent of such excess. The Act also imposes penalties for failure to make the proper tax return.

The taxpayer maintained that the tax was unconstitutional, because it is a direct tax and is not apportioned among the states; that the statute is violative of the due process clause, because it does not sufficiently define the term "established price", and that the tax is unconstitutional because in passing the Act Congress undertook, under the guise of taxation, to fix prices on tickets, and interfere with the rights of dealers to set their own prices. In effect,

[18] No. 861—*McKenna v. Anderson, Collector.* May 27, 1929.

it was maintained that Congress undertook to do what the Supreme Court held the State of New York could not do when it passed the "ticket-scalpers law".[19]

Statute of Limitations

Among the provisions which have given rise to a considerable amount of controversy are those relating to the periods of limitation. In the Internal Revenue Acts, Congress succeeded in building up a complicated structure of limitation provisions, with periods of limitation on assessments, on collection of taxes, on claims for refunds, on suits to recover overpayments. To illustrate the complications, a question arose whether the collection of a tax is barred, if the Commissioner assesses taxes under the Revenue Act of 1918 within the five year period of limitations prescribed in the Act and before the passage of the Revenue Act of 1924, and the collection of the tax is begun after the five year period of limitations and after the passage of the 1924 Act. In this case the Commissioner could have assessed the tax after the passage of the 1924 Act and within the five year period prescribed in the 1918 Act, in which case he would have had six years after the assessment within which to collect the tax. The Supreme Court held,[20] however, that since the assessment was made before the 1924 Act was

[19] *Tyson & Bro. v. Banton*, 273 U. S. 418.

[20] No. 58—*Russell v. United States.* January 2, 1929.

passed, the six year period of limitation in the 1924 Act for collection after assessment did not operate, and the tax was barred by the statute of limitations. This is but an illustration of the various cases coming to the Court on the question of the periods of limitation under the Revenue Acts.

A case[21] which aroused a great deal of interest among tax attorneys throughout the country was one in which the Supreme Court held that the Government may proceed to collect on a bond given to secure a tax, although the tax itself was barred by the period of limitations. In that case the taxpayer filed a bond to stay the collection of a tax pending consideration of a claim for abatement. While the claim was being considered the statute of limitations for the collection of the tax had run, and the Government filed suit to collect on the bond.

The theory on which the Government proceeded was this: Suit for collection of the taxes was barred by the special statute of limitations contained in the Revenue Acts. This action, however, was brought not to collect the tax, but to collect on the bond, that is, on the contract between the Government on the one hand and the taxpayer and the surety company on the other, which contract was not barred by the statute of limitations, because no statute of limitations runs against the Government in any actions brought by it on contracts.

[21] No. 526—*United States v. John Barth Company.* May 13, 1929.

The Circuit Court of Appeals for the Seventh Circuit, however, held that the action on the bond also lapsed, because the obligation under the bond depended on the obligation to pay the taxes, and since the liability for taxes was extinguished the obligation under the bond was likewise extinguished. The Supreme Court reversed the decision of the Circuit Court of Appeals, sustaining the Government's contention.

VII

STATE TAXATION

The power of states to tax instrumentalities of the Federal Government, such as United States tax-exempt securities, national banks and interstate commerce, were among the questions considered by the Supreme Court during the past term. The Court also passed on the constitutionality of the corporation taxes imposed by New York, Missouri, Arkansas and Washington, and disposed of a number of problems concerning the power of states to tax inheritance. The cases considered by the Court may be roughly classified into those in which the validity of the taxes was questioned on the ground that they constituted burdens on instrumentalities of the Federal Government, on the ground that they were burdens on interstate commerce, or on the ground that they were contrary to the due process clause or the equal protection clause of the Constitution.

Instrumentalities of Federal Government

How far the states may impose tax burdens on instrumentalities of the Federal Government, was the chief question in this group of cases. In *Macallen Company* v. *Massachusetts*,[1] the Supreme Court held that a state may not impose a corporation fran-

[1] No. 578—*Macallen Co. v. Massachusetts.* June 3, 1929.

chise tax, based on the net income of the corporation, including income from United States Government securities.

This franchise tax was based on the net income of corporations, and net income was defined as the net taxable income required to be reported for federal tax purposes, plus any net losses which are deductible under the Revenue Act, and all interest and dividends not required to be returned as net income under the Revenue Act, except dividends on shares of stock of Massachusetts corporations and dividends in liquidation paid from capital. The definition of net income thus included income from federal tax-exempt securities.

The Massachusetts courts sustained the constitutionality of the Act, holding that the tax was not imposed on the items of income from federal government securities, but was an excise tax on the corporation's right to do business. But its decision was reversed by the Supreme Court. It held that the tax as imposed, though based on the *net* income of the corporation, was a burden on Federal tax-exempt securities and was therefore unconstitutional.

Justice Stone, with whom Justices Holmes and Brandeis concurred, dissented from this view, maintaining that there is a sound distinction in this respect, between a franchise tax based on gross income and that based on net income. For in the former case, the franchise tax varies in exact proportion to the income from tax exempt securities, which is not the case with the latter. Justice Stone con-

cluded that, although a tax based on gross income would be unconstitutional, a tax based on net income is within the proper taxing powers of the state, even though all the property of the corporation were tax-exempt securities of the United States and income derived from them. Following this decision, petitions for a rehearing were filed by a number of states having similar provisions in their taxing statutes. These petitions were denied.

The power of states to tax national banks came up in two cases, wherein it was claimed that the taxes imposed on national bank shares discriminated in favor of other moneyed capital competing with national banks. In the first case, which came from South Dakota,[2] the state courts dismissed the complaint of the bank, because in applying for the refund, the bank did not specify its reasons in the manner provided by the state statute. The bank appealed to the Supreme Court, but the appeal was dismissed for the reason that the judgment of the lower court was based on a non-federal ground, sufficient to support the decision.

In Kansas, the state maintained that the taxes imposed on national bank shares were imposed on the shareholders, not on the banks themselves, although the banks were required to pay the taxes. In a suit[3] brought by a national bank to recover

[2] No. 424—*Security National Bank v. Iver Twindle, et al.* November 26, 1928.

[3] No. 189—*Paul T. McFarland, County Treasurer of Shawnee Co., Kans., et al. v. Central National Bank of Topeka, Kans.* Oct. 8, 1928.

such taxes on the ground that they were discriminatory, the Kansas authorities argued that the bank was not the party in interest; that the action could be brought only by the shareholders, and not by the bank. This contention was overruled by the Circuit Court of Appeals, and the Supreme Court declined to disturb that decision.

This year, the Supreme Court reiterated its decision [4] that a state may not tax gasoline sold to the Federal Government. The question came up in a case from Texas.[5] Under the Texas law, an occupational tax of one cent per gallon was imposed on all persons selling gasoline at wholesale in the state. The Grayburg Oil Company sold quantities of gasoline to the United States Government under contracts requiring the Oil Company to deliver the gasoline upon a military reservation subject to inspection. The Texas authorities took the position that the Oil Company should have paid the gasoline tax upon these sales, and brought suit to recover the amount of the tax together with interest and penalties.

The Company maintained that it was not liable because the tax, if applied to these sales, would amount to imposing a burden on an agency or instrumentality of the United States, and would, therefore, be unconstitutional. It also maintained that since the gasoline was sold under contracts

[4] *Panhandle Oil Co. v. Mississippi, ex rel. Knox*, 277 U. S. 218.

[5] No. 147—*Grayburg Oil Co. v. State of Texas.* January 21, 1929.

f. o. b. military reservation, the deliveries of the gasoline from points within the State to the military reservation constituted interstate commerce and were, therefore, sales which were not within the provision of the Texas statute.

The Texas courts sustained the constitutionality of the tax as applied to these sales, on the ground that this was not a tax on the gasoline, but an occupational tax measured by the quantities of gasoline sold. On appeal, the Supreme Court reversed that decision without an opinion.

Burden on Interstate Commerce

The largest class of cases, questioning the power of the states to tax instrumentalities of the Federal Government, were those where it was argued that the taxes constituted burdens on interstate commerce.

Where gasoline is shipped into a state for export and there put into tanks to await further shipment, whence it is pumped into tank steamers, a tax may not be imposed by the state on the average amount of gasoline in such tanks. This was the Supreme Court's ruling in a case [6] questioning the constitutionality of the Louisiana gasoline tax as applied to gasoline stored for export.

After obtaining orders from foreign buyers, the Carson Petroleum Company went into the Mid Continent Field and purchased oil for export. This oil

[6] No. 306—*Carson Petroleum Co. v. Leon C. Vial, Sheriff.* April 8, 1929.

was shipped by railroad to New Orleans in tank cars under export bills of lading. There, the oil was removed to storage tanks where it awaited shipment by tank steamers.

The State of Louisiana levied a tax on the average amount of oil while in the stationary tanks awaiting removal to the steamers, and the Carson Company brought suit to restrain the collection of the tax, on the ground that this was a tax on exports and therefore unconstitutional.

The Louisiana District Court granted the injunction, but this was reversed by the Supreme Court of Louisiana, which held that the continuity of the interstate and foreign transportation was interrupted to such an extent that the oil was subject to taxation by the State.

On appeal, the Supreme Court reversed the decision of the Supreme Court of Louisiana, holding that the interstate or foreign commerce was not interrupted, since the object of the storage of the oil in the stationary tanks was merely to await the arrival of the steamers which were to continue the shipment originally planned. The court therefore held that as applied in this case, the tax was imposed on exports and was therefore unconstitutional.

The court also held that the State of Kentucky could not tax gasoline used in the State by a company operating a ferry between a point in Kentucky

and one in Illinois.[7] Under the law of Kentucky, a gasoline tax is imposed on all gasoline sold at wholesale, and the words "at wholesale" are defined to include "any person who shall purchase or obtain gasoline outside of the State and sell or distribute or use the same within the State."

The Metropolis Ferry Company operated a ferry across the Ohio River between Illinois and Kentucky. This ferry was operated by gasoline, and the Kentucky authorities imposed a tax on the gasoline used within the State. It was stipulated in this case that 75% of the gasoline used in the operation of the ferry was used within the boundaries of the State of Kentucky.

The Company maintained that the tax imposed was unconstitutional, because the gasoline was used in transportation in interstate commerce, and therefore the tax was a burden on interstate commerce. Since the gasoline was constantly imported into and exported from the State of Kentucky, it maintained, the tax amounted to levying duties on imports and exports; and since the gasoline was only transiently within the State, the Company argued, the tax was also violative of the Fourteenth Amendment.

The Kentucky courts sustained the constitutionality of the tax, and the owners of the ferry appealed the case to the Supreme Court on the above constitutional grounds. The Supreme Court held that the

[7] No. 296—*James R. Helson, et al., etc. v. Commonwealth of Kentucky, etc., et al.* April 8, 1929.

tax, as applied, was a burden on interstate commerce and was therefore unconstitutional.

The Minnesota gross receipts tax on interstate railroads was attacked as imposing a burden on interstate commerce.[8] This tax is based on the intrastate earnings of railways in Minnesota, and on such proportion of their interstate earnings, as the mileage in Minnesota bears to the entire mileage over which such interstate business is done. The validity of this tax was questioned as applied to the following circumstances:

The Great Northern Railway Company hauled iron ore from the mines in Minnesota to the Lake Docks in Wisconsin. The mileage in Minnesota on these shipments constituted 81 per cent of the entire haul. The dock was owned by a subsidiary of the Railway Company. After the cars were delivered to the Dock Company, the latter performed switching services, mixed, graded and stored the ore upon the docks and loaded it upon steamships. Under the contract between the Railway and the Dock Company, the latter received as compensation approximately one-fourth of the entire charge made by the railroad, and the balance was retained by the railroad as compensation for the rail haul.

The tax was imposed upon 81 per cent of the entire earnings, but the railroad refused to pay any tax upon that portion of the total charge which was

[8] No. 106—*Great Northern Railway Co. v. State of Minnesota.* Feb. 18, 1929.

paid to the Dock Company for its services rendered in Wisconsin.

This action was brought to compel the railroad company to pay the Minnesota tax upon 81 per cent of the money thus paid to the Wisconsin Dock Company. The railroad contended that this would amount to a tax on interstate commerce; also that this was a tax on earnings of the railroad obtained outside of the State, and was therefore without the taxing jurisdiction of the State of Minnesota.

The Supreme Court of Minnesota held that the Railway Company was liable on the entire 81 per cent of its gross receipts for the hauling of the ore to the docks in Wisconsin, without deducting the charges paid under the contract between the railway company and its subsidiary. Upon this ruling, the Railroad Company appealed to the Supreme Court of the United States, which affirmed the decision of the Minnesota courts.

The constitutionality of the Maryland Oyster law was questioned because the state required oyster shuckers to surrender to the state 10% of the oysters shucked by them, or the equivalent in money. The complainants argued that this imposed a tax on interstate commerce, since some of the oysters shucked in Maryland came from other states. But the Supreme Court, in sustaining the law, held that the shucking of oysters, imported into

the state, did not bear such direct relation to interstate commerce as to render the tax invalid.[9]

The State of Tennessee imposed a franchise tax based on the net income of all corporations, which income was derived from business done entirely within the state. The Act expressly exempted "earnings arising from interstate commerce." A corporation engaged in kiln-drying, resawing and resurfacing of lumber maintained that the Act, as applied to it, was a burden on interstate commerce, because its earnings were derived from "manufacture in transit". The lumber in question was shipped from various points in Louisiana, Arkansas, and Mississippi, to states north and east of Tennessee, and it was stopped in transit at Memphis for the purpose of having the manufacturing operations done there, to reduce the weight of the shipment and to put the lumber in the condition which the contract with the ultimate consignee required. The lumber was forwarded from the point of shipment to the point of ultimate destination on the original bill of lading.

The State of Tennessee maintained that although the shipment was interstate commerce, the manufacture itself was not, and furthermore, that the state had a right to impose a franchise tax on corporations, based on the net income derived from interstate commerce. In the appeal from the decision of

[9] No. 260—*Ivy L. Leonard, et al. v. Swepson Earle, Conservation Comm'r.* May 13, 1929.

the Tennessee courts, which sustained the tax, the Supreme Court did not pass on the constitutional question, but dismissed the case for lack of jurisdiction.[10]

Due Process and Equal Protection

Most of the taxes challenged on the ground that they violated the Fourteenth Amendment were inheritance and corporation taxes.

Of the inheritance or transfer tax laws considered, the most interesting and important, and at the same time the most complicated was the New York Transfer Tax Act, as applied to vested and contingent transfers. Under the law, a graduated tax, based on exemptions, is imposed on all transfers, and the rate of the tax imposed varies not only with the amount of the transfer, but also with the relationship of the beneficiary to the deceased.

Since 1885, when the Transfer Tax was first enacted, the problem arose as to how and when to tax the contingent remainders of transfers, as in a case where an estate is left to a certain person for life, and after the death of the latter, is to be divided among others. The problem which confronted the State was to find a method of taxation which would give no undue advantage to the life tenant as against the remainderman, or to the latter as against the former, and at the same time to insure the payment of the taxes to the state. The methods to be adopted

[10] No. 230—*Jorgensen-Bennett Manfg. Co. v. Will S. Knight, Sheriff.* Jan. 21, 1929.

had to be balanced against the practical difficulties in the administration of an inheritance tax system over a long period of years. Various methods were tried with varying degrees of success or failure.

The Amendment of 1925 finally adopted the following method, which may be illustrated by the case which came to the Supreme Court to test the validity of the Act.[11] A resident of New York died leaving an estate valued at $322,000. The will provided that the property shall be enjoyed by the widow for life, and the remainder shall be divided equally among his children, if living, or to their respective offspring. In accordance with the method prescribed, the value of the widow's life estate, was appraised at $125,000 on the basis of mortality tables, and the inheritance tax was assessed on that transfer. Then the contingent remainder was appraised at the full value of the estate without deducting the widow's interest, namely, at $322,000. A temporary taxing order was issued on that amount, and security for the future payment of the tax was required. The law provides that after the widow's death, the amount of the tax will be adjusted on the basis of the actual value of the estate which will be transferred to the remainderman.

The validity of this procedure was contested in the New York courts, which sustained the validity of the Act, and the remaindermen then brought the case to the Supreme Court. Here they argued that

[11] No. 79—*Salomon v. State Tax Comm'n of New York.* Feb. 18, 1929.

the statute constituted a denial of due process, because the tax was imposed on an amount greater than the value of the estate, that is, on $125,000 plus $322,000 or $447,000, whereas the entire estate was valued at $322,000.

The Court overruled this contention, because the tax on the contingent remainders is not payable until after the death of the life tenant, the widow; the temporary taxing order was issued only to insure that the tax will be paid when ultimately assessed; and if the amount of security or cash paid will exceed the amount of the tax when it becomes payable, the excess will be accounted for to the executor.

The remaindermen also argued that the tax denied them the equal protection of law, because the life tenant's interest is valued as of the time of the testator's death, that is, when the life tenant comes into possession of the estate, whereas the interests of the remaindermen are not assessed as of the time when they come in possession, but at the death of the testator, without deducting the value of the intervening life estate. This, they maintained, is not the equivalent of valuing the estate as of the time of the death of the life tenant. The Court conceded that this is not an exact equivalency, but held that this is unavoidable, unless the state is willing to postpone levying the tax on the remainders until the latter come into possession of the property, which, however, it is not obliged to do. There are

sufficient differences between vested and contingent remainders to justify such classification in imposing inheritance taxes.

The provision in the Inheritance Tax Law of Iowa, imposing a greater burden of taxation on transfers made to non-resident aliens than on residents or citizens, was held to be contrary to the Favored Nations Clause of our Treaty with Denmark, in a case in which the beneficiary was a Danish subject.

In this case, a resident of Iowa and a subject of Denmark died and left an estate to a non-resident alien, who claimed that the law was unconstitutional, because contrary to the above mentioned clause of the Treaty. The courts of Iowa sustained the tax as one imposed on the right to inherit and within the taxing powers of the state, but the Supreme Court reversed their decision.[12]

A similar principle was involved in the decision of the Court of Appeals of Virginia, when it held the Virginia Estate Tax invalid, as applied to non-residents.

Under the Virginia Law a graduated tax, with certain exemptions and deductions, was imposed on the transfer of properties belonging to resident decedents, while a flat rate tax without exemptions or deductions was imposed on property left in the State by non-resident decedents. The Court of Appeals of the state held that this constituted a discrimination against the non-residents and a denial

[12] No. 115—*Nielsen v. Johnson.* February 18, 1929.

to them of the privileges and immunities enjoyed by residents, in violation of the federal Constitution. The State of Virginia petitioned the Supreme Court to review this ruling, but the petition was denied.[13]

Recent tendencies to transfer property in order to avoid large inheritance taxes, have caused some states to enact legislation imposing the burden of proof on the recipients of the property to show that the transfers were not made in contemplation of death, and that therefore an inheritance tax should not be imposed on such property. In Ohio, the statute imposed the burden of proof on the transferee, if the transfer was made within two years before the death of the transferor. In Wisconsin, the burden of proof was attached to the transferee, if the transfer was made within six years before the death. It was argued that these laws were without due process.

Under the law of Ohio, if a gift is made within two years before the donor's death, the presumption is that the gift was made in contemplation of death and the amount is included in computing the inheritance tax. The Supreme Court of Ohio interpreted the words "transfers in contemplation of death" as meaning transfers where the purpose was to distribute one's property, rather than to bestow a gift or a favor on the particular person to whom the property is transferred, irrespective of whether the

[13] No. 871—*Commonwealth of Virginia v. Marshall & Illsley Bank.* May 20, 1929.

donor made the gift or transfer because he felt the approach of the end of his days.

The case was appealed by the donees to the Supreme Court of the United States, claiming that the inheritance tax as interpreted by the Supreme Court of Ohio was unconstitutional. They maintained that the interpretation given to the words "transfers in contemplation of death", and also the provisions in the act, imposing the burden of proof upon the donee, that the transfers were not made in contemplation of death, deprived them of property without due process of law and also of the equal protection of the laws. but the Supreme Court dismissed the appeal for lack of a substantial federal question in the case.[14]

The second case came from Wisconsin,[15] where the inheritance tax law provided that gifts made within six years from death shall be *conclusively* presumed to have been made in contemplation of death. In a previous decision [16] the Supreme Court of the United States held that this provision was unconstitutional, and in the present case the donees relied on that decision.

In this case, however, the executors paid the tax and then sued to recover the same. The trial court sustained the validity of the law, and no appeal was taken to the highest court of the State. All this

[14] No. 52—*Parker v. Tax Commission of Ohio.* November 19, 1928.

[15] No. 441—*Beck v. Milwaukee County.* Oct. 22, 1928.

[16] *Schlesinger v. Wisconsin,* 270 U. S. 230.

happened before the Supreme Court rendered the above decision. Shortly afterwards, the donees again brought action to recover the amount of the inheritance tax paid on the gifts, but the Supreme Court of the State held that recovery could not be had because (1) the tax had been paid voluntarily, and not under protest or because of any duress on the part of the State, and (2) the controversy had already been disposed of in the former decision of the trial court, which had not been appealed. In opposition to the petition filed in the Supreme Court to review that decision, the State of Wisconsin argued that the Supreme Court had no jurisdiction in the case, because the decision of the State court was based on non-federal grounds abovementioned. The Supreme Court declined to take jurisdiction.

Corporation Taxes

The Supreme Court also invalidated the corporation franchise taxes imposed by the State of Washington, in so far as the taxes were based on the entire authorized capital stock of the corporation, regardless of the amount of stock actually issued.

Under the law, foreign corporations doing business in the state must pay certain filing fees and annual license taxes as a condition to their doing business in the State. These fees and license taxes were based on the entire authorized capital stock of the foreign corporations, and were graduated according to the amount of authorized stock, regard-

less of the amount actually issued. The filing fee provision, however, was limited to $3,000, and the license fee provisions was likewise limited to $3,000.[17]

A foreign corporation doing business in the state maintained that the required fee and the license taxes constituted a burden on interstate commerce and was a tax on property outside the State. It brought suit in the Statutory U. S. District Court in Washington to enjoin the enforcement of the tax. The injunction was denied, and the Company brought the case to the Supreme Court. Here the State maintained that the Act was not unconstitutional because it was within the proper taxing power of the State to enforce a fee for the privilege of doing business in the State, and because a reasonable limit was set in each case to the amount which may be required from foreign corporations.

But the Supreme Court held the tax a burden on interstate commerce and therefore repugnant to the federal Constitution, notwithstanding the fact that the statute set a maximum limit on the amount to be paid. Justice Brandeis, with whom Justice Holmes concurred, dissented, maintaining that the tax was a proper excise on the foreign corporation's right to do business in the State. Said Justice Brandeis:

> "It would be unfortunate to hold that merely because a foreign corporation, doing a local business, does also interstate business, the State may

[17] No. 278—*Cudahy Packing Co. v. Hinkle.* Feb. 18, 1929.

not lay upon it a reasonable, non-discriminatory excise, necessarily limited to a reasonable amount, to which all domestic corporations similarly situated are subject and which can affect interstate commerce only indirectly, if at all. To hold such a tax void seems to me to ignore the wise rule of decision declared in *Postal Telegraph Cable Co.* v. *Adams,* 155 U. S. 688, 698: 'The substance and not the shadow determines the validity of the exercise of the (taxing) power'."

On the other hand, the Court upheld the corporation franchise taxes of New York [18] and Missouri.[19] The contention here was that the taxing statutes violated the equal protection clause of the Constitution, in that the tax was based on the par value of the outstanding capital stock and surplus employed within the state, treating the non-par stock, however, as having a given value. In Missouri, the non par stock was arbitrary treated as having a value of $100; while in New York the tax on each share of such stock was placed at six cents. The corporations argued that this method of taxation resulted in inequalities, since the actual values of non-par stock were not taken into consideration. The Supreme Court held, however, that the distinction between par and non-par stock for purposes of taxation was reasonable, and that the resulting discriminations were therefore not contrary to the equal protection clause of the Constitution.

[18] No. 601—*New York v. Latrobe, Jr.* May 13, 1929.

[19] No. 579—*International Shoe Co. v. Shartel.* May 13, 1929.

Another case from Missouri concerned a similar franchise tax on domestic corporations.[20] It was maintained that the tax was without due process, because in computing the value of the stock, no deductions were allowed for the liabilities of the corporation. In this case, the complaining corporation was an interstate carrier, and therefore it was also argued that the tax constituted an undue burden on interstate commerce. The Supreme Court, however, declined to disturb the decision of the Missouri courts upholding the validity of the tax.

The State of Arkansas passed a "Back Tax Law", directing the Attorney General of the State to institute proceedings to recover back taxes due from corporations. This law was attacked as being contrary to the equal protection clause of the Constitution, because it applied to corporations and not to individuals or partnerships owing back taxes.[21] The Supreme Court, in sustaining the validity of this law, was of the opinion that, while a state may not unduly discriminate in levying taxes between corporations and individuals, this prohibition does not apply to the recovery of taxes actually due. Justice Butler, with whom the Chief Justice and Justice Van Devanter concurred, were of the opinion that the law should be declared unconstitutional

[20] No. 360—*Missouri ex rel. Missouri-Pacific Ry. Co. v. Danuser*, Oct. 22, 1928.

[21] No. 101—*White River Lumber Co. v. Arkansas ex rel. Applegate.* May 27, 1929.

for the reason that the prohibition against the denial of equal protection applies to unequal enforcement of nondiscriminatory legislation, as well as to the making of discriminatory laws.

Jurisdiction to Tax

Several cases questioned the right of their respective states to impose taxes altogether, on the ground that the subject of the tax was not within the jurisdiction of the state.

This year the Supreme Court reiterated its previous decision [22] that the State of Virginia may not tax the resident beneficiary of a trust, beyond his beneficial interest, on trust property located outside the state, where the person creating the trust and the trustee are not residents of the state. In this case [23] a resident of Massachusetts transferred bonds of an Illinois corporation to trustees in New York, to be held in trust for a resident of Virginia during his life time. The State of Virginia imposed a personal property tax on the trust property, on the theory that the resident was the beneficial owner of it. The tax was sustained by the Virginia Courts, but their decision was reversed on the authority of the previous decision on a similar state of facts.

A similar question came from the State of South Carolina, which imposed an inheritance tax on the executors of a resident of Illinois, merely because a

[22] *Brooke v. City of Norfolk*, 277 U. S. 27.

[23] No. 38—*Crane v. Virginia*. Oct. 22, 1928.

South Carolina corporation owed him some money. The executors argued that the debt followed the creditor and that, therefore, the State of South Carolina lacked jurisdiction to impose this tax. The State, on the other hand, maintained that the debt is enforceable and is kept alive only by virtue of its laws, therefore it has the power to tax that property. The case [24] was argued, but is still awaiting decision in the Supreme Court.

[24] No. 39—*Beidler v. South Carolina Tax Commission.* (Case still pending.)

VIII

ANTI-TRUST ACTS AND UNFAIR COMPETITION

The Clayton Anti-trust Act figured prominently in a number of cases during the term. The provisions in the Act specifically stressed concerned those dealing with price discrimination, tying contracts and interlocutory directorates. The application of the anti-trust laws to labor disputes was again brought before the Court, and the famous Packers' Consent Decree reappeared in the guise of a jurisdictional question.

Packers' Consent Decree

In 1920, after an investigation by the Federal Trade Commission, in which that body found that the Packers were threatening to monopolize the groceries business in the United States, the Department of Justice brought suit against the Big Five Packers, Swift & Co., Armour & Co., Wilson & Co., Morris & Co. and Cudahy Packing Co., in the Supreme Court of the District of Columbia, to enjoin them from violating the Sherman Anti-trust Act and the Clayton Law. The Packers denied the allegations stated in the complaint. At the same time, the Packers and the Department of Justice agreed upon a decree commonly known as the "Packers' Consent Decree", which was entered by the court.

This decree, though reciting that it shall not be construed as a finding by the Court or an admission by the Packers that they have been guilty of any violations of law, perpetually enjoined the Packers: (1) from directly or indirectly entering into contracts, combinations or conspiracies to monopolize any part of commerce; (2) from directly or indirectly owning any capital stock or other interest in any public stock yard market company, or any stock yard terminal railroad, or any stock yard newspaper or journal, or any public cold storage warehouses, except as provided in the decree; (3) from directly or indirectly using their distributive system and facilities for manufacturing, selling or otherwise dealing in fish, seafoods, groceries, feeds, grain, cigars, furniture, hardware, etc.; (4) from directly or indirectly owning or voting fifty per cent or more of stock in any corporation dealing in the above products; (5) from directly or indirectly owning or conducting any retail meat market, except at their own plants for the accommodation of their own employees; (6) from directly or indirectly dealing in dairy products, except in the manufacture of condensed, evaporated or powdered milk; and (7) from engaging in any illegal trade practices.

The decree also directed the Packers to submit for the Court's approval a plan or plans for divesting themselves of all their ownership or interest in public market companies, stock yard terminal railroads, market newspapers, public cold storage ware-

houses and retail meat markets; and to dispose of all commodities owned by them which under the decree they were prohibited from manufacturing, selling or otherwise dealing in.

In 1924, four years later, the Packers made a motion in the Supreme Court of the District of Columbia to vacate the consent decree on the grounds that at the time it was entered, the Court had no jurisdiction in the case, and that the Attorney General had no authority to agree upon the decree.

The Court denied the motion to vacate the decree, and the Packers appealed to the Court of Appeals of the District of Columbia. This court certified the jurisdictional question to the Supreme Court of the United States. The Supreme Court then required the entire record in the case to be certified to it, so that it might consider the entire controversy.

The federal anti-trust acts forbid contracts and combinations in restraint of trade and commerce among the states and within the District of Columbia. Jurisdiction to enforce the Sherman anti-trust act was originally given to the Circuit Courts, and by a later act, all the powers of the Circuit courts were transferred to the District Courts. Jurisdiction to enforce the Clayton Act was conferred on the District Courts. Both acts, however, failed to specify "and the Supreme Court of the District of Columbia."

The question therefore arose whether the Supreme Court of the District of Columbia is a Dis-

trict Court within the meaning of the anti-trust acts. Mr. Charles Evans Hughes, representing the Packers in the Supreme Court, argued that if that court did have jurisdiction, it was only when holding a special term as a District Court of the United States, which was not the fact in the instant case.

On March 19, 1928, the Supreme Court rendered its decision, in which it refused to set aside the decree, for the reason that, having consented to the decree, the Big Five Packers could not afterwards complain of the legal deficiencies therein.[1]

In deciding the case, the Supreme Court could have affirmed or reversed the decision of the lower court on the merits of the decree or could have limited itself to the jurisdictional question. It affirmed the decision of the Supreme Court of the District of Columbia on jurisdictional grounds and the reasons for the affirmance were the very reasons why the Court did not enter into the merits of the decree.

A consent decree in our law is treated as a solemn agreement between the parties and receiving the sanction of the court. It cannot be changed by the court without the consent of the parties, nor can one of the parties obtain relief from the decree without the consent of the other party. The only manner in which a consent decree can be attacked is by a showing that, although apparently there was a consent, yet, on account of fraud or some gross mistake, ac-

[1] *Swift & Co., et al. v. United States*, 276 U. S. 311.

tual consent was lacking. Neither fraud nor mistake were relied upon by the Packers.

The Supreme Court held that the Supreme Court of the District of Columbia had jurisdiction both of the subject matter and of the parties in the case. Beyond this the decree itself was not subject to attack by the Packers on account of any defects which might be in it, such as, generality or comprehensiveness or because the decree went beyond the prohibitions against restraint of interstate commerce. Mr. Justice Brandeis in delivering the opinion of the Court said:

> "The defendants by their consent lost the opportunity of raising the question on appeal * * *. The defendants ignore the fact that by consenting to the entry of the decree, 'without any findings of fact', they left to the court the power to construe the pleadings, and, in so doing, to find in them the existence of circumstances of danger which justified compelling the defendants to abandon all participation in these businesses, to divest themselves of their interest therein, and to abstain from acquiring any interest hereafter."

This decision apparently did not set at rest all the issues in the case. Last term the California Cooperative Canneries brought their case arising out of the Consent Decree. At the time the Packers petitioned for an annulment of the Decree, the Canneries also petitioned the Supreme Court of the Dis-

trict of Columbia to set aside the decree or to modify it, because that decree rendered unenforceable their contracts, whereby the Packers had undertaken to purchase the products of the Canneries for a number of years, and yet the Canneries had not been made a party to the proceedings.

The Supreme Court of the District denied the petition of the Canneries to intervene in the case, but on appeal, the Court of Appeals of the District reversed the judgment of the lower court. The Government brought the case to the Supreme Court of the United States.[2]

This Court, again in an opinion by Mr. Justice Brandeis held that the Court of Appeals of the District had no jurisdiction to entertain the appeal of the Canneries, that in equity proceedings under the anti-trust acts, Congress provided for a direct appeal from the District Courts to the Supreme Court of the United States, and that in this respect the Supreme Court of the District is deemed to be a District Court, and the Court of Appeals of the District occupies the position analogous to that of the Circuit Court of Appeals.

This ended the litigation in which the Packers attempted to have the consent decree set aside or nullified without the consent of the Government, but this has not set at rest the Packers' attempt to have the decree modified. At present there is a petition

[2] No. 375—*United States v. California Cooperative Canneries.* May 20, 1929.

in the Supreme Court of the District of Columbia for a modification of the decree, and the Department of Justice is entertaining the question whether the Government should assent to a modification.

Price Discrimination

The Clayton Act prohibits price discrimination, where the effect might be to lessen competition or to tend to create a monopoly "in any line of commerce." The question arose whether this provision was applicable to a case where the seller was not engaged in the same line of business as the buyers, among whom he discriminated. It was contended that the provision in the Clayton Act applied only to those cases where both the seller and buyer are engaged in the same line of commerce, but the Supreme Court held otherwise.[3]

The price discrimination clause was also involved in a case questioning its application to commerce between the United States and Porto Rico. The Porto Rican American Tobacco Company brought suit to enjoin the American Tobacco Company from selling "Lucky Strike" cigarettes in Porto Rico at a lesser price than that at which they were sold in the United States. The American Tobacco Company maintained that the word "commerce" in the Act did not apply to trade with an unincorporated territory of the United States. The Circuit Court

[3] No. 94—*George Van Camp & Sons Co. v. American Can Co.* Jan. 2, 1929.

of Appeals for the Second Circuit held that the Clayton Act was applicable, and the Supreme Court declined to review that decision.[4]

Tying Contracts Applicable to Patented Devices

Tying contracts are prohibited by the Clayton Act, even if the contracts relate to patented devices. This was involved in the case of the *Radio Corporation of America* v. *Arthur D. Lord.*[5] The Radio Corporation granted licenses to manufacture its patented devices, retaining for itself the right to make and supply certain essential parts of the patented structures. The Circuit Court of Appeals held that the patentee could not append such conditions to the license. Heretofore, it has been assumed that this prohibition in the Clayton Act was not applicable to patented devices. The Supreme Court, however, declined to go into the question, thus refusing to disturb the decision of the Circuit Court of Appeals.

Interlocking Directorates

An important case under Section 7 of the Clayton Law came to the Supreme Court during the past term. Section 7 prohibits the acquisition of the stock of one corporation by another, where the ef-

[4] No. 812—*American Tobacco Co. v. Porto Rican American Tobacco Co.* April 29, 1929.

[5] No. 508—*Radio Corporation of America v. Lord.* November 26, 1928.

fect of such acquisition might lessen competition or tend to create a monopoly in any line of commerce. It has previously been held by the Supreme Court that the Federal Trade Commission had no power to order a corporation to divest itself of the stock and property of another corporation, if these were acquired before the Commission instituted proceedings.[6]

In this case,[7] the International Shoe Company acquired the stock of the McElvin Company for over $9,000,000. The Commission instituted proceedings. The International Shoe Company then acquired the assets of the McElvin Company. The Commission issued an order directing the Shoe Company to divest itself of the stock and assets. The International Shoe Company argued that Section 7 of the Clayton Act was not applicable, because there was no competition between the two companies, and therefore there could be no lessening of competition, (1) because the McElvin Company manufactured a different type of shoe, and (2) because the McElvin Company was in a failing condition and could not compete with the International Shoe Company.

The Commission took the position that the stock of a failing or insolvent corporation is not usually acquired for $9,000,000. The Circuit Court of Ap-

[6] *Thatcher Manufacturing Co. v. Federal Trade Comm'n*, 272 U. S. 554.

[7] No. 718—*International Shoe Co. v. Federal Trade Comm'n.* (Case still pending.)

peals sustained the order of the Commission. The Supreme Court at first denied the writ to review the case, but on a petition for rehearing, the Court revoked its previous order, and substituted an order granting the writ.

For the present, the application of Section 7 of the Clayton Act in such cases is dependent on the question, "who gets there first",—whether the Federal Trade Commission in instituting proceedings, or the corporation in acquiring the assets of its subsidiary?

Anti-Trust Laws and Labor Problems

The application of the Anti-Trust Acts to labor problems has in the past number of years become a question of vital importance. The Journeymen Stonecutters' Association of North America appealed from a decree of the District Court in New York, enjoining the Union from interfering with interstate commerce, by causing or encouraging strikes. The Union maintained that the injunction should not have been directed against it, because the acts of its officers had not been authorized either by the Union or by its Executive Committee. The appeal in the Supreme Court, however, was dismissed because of a technicality in procedure, namely that it failed to give notice of summons and severance to the defendants who had not joined in the appeal.[8]

[8] No. 72—*Journeymen Stonecutters' Ass'n. v. United States.* Nov. 19, 1928.

The injunction issued against the United Mine Workers last year was attacked at a public meeting by one Anthony Minerich who minced no words in advocating the violation of the injunction. He was sentenced for contempt of court, without a trial by jury, and he petitioned the Supreme Court to review the case, maintaining that the injunction, as applied, was contrary to the Clayton Act. The lower courts had ruled that the injunction could not be attacked collaterally, and the Supreme Court declined to review their decision.[9]

In two cases involving the application of the anti-trust acts to labor disputes, labor organizations were successful. In the suit brought by the Pennsylvania Mining Company against the United Mine Workers of America, in which the Company sought an injunction and triple damages in the sum of $300,000, the lower courts held that the evidence did not bear out a conspiracy to violate the anti-trust acts, and the Supreme Court declined to review the case.[10]

The extent of the ruling in the Coronado case [11] was brought into question in a suit brought to enjoin the Actors' Equity Association from carrying into effect one of its resolutions, forbidding its members to enter into contracts with any booking agent not

[9] No. 669—*Minerich v. United States.* March 11, 1929.

[10] No. 616—*Pennsylvania Mining Co. v. United Mine Workers of America.* March 5, 1928.

[11] *United Mine Workers of America v. Coronado Coal Company,* 259 U. S. 344.

licensed by the Association. The action was brought by a citizen of Holland who claimed that the Federal Court in New York had jurisdiction on the ground of diversity of citizenship. The Court held, however, that since the Actors' Equity Association was unincorporated, and since some of the members of the Association were also aliens, there was no diversity of citizenship. He then petitioned for a writ of mandamus to compel the District Court to entertain the suit, claiming that, under the rule in the Coronado case, an unincorporated association is treated in the same manner as a corporation. The Circuit Court of Appeals for the Second Circuit denied the writ, holding that the rule in the Coronado case was applicable only in suits brought under the Anti-Trust Acts. The Supreme Court declined to review that decision.[12]

The Seamen on the Pacific Coast became involved in anti-trust litigation, complaining against the Pacific Association of Shipowners and Operators for having instituted a central employment agency, which used a system of rotation in the employment of seamen. Cornelius Anderson had applied for a job, waited for a period of three months, and then in accordance with the rules of the employment agency his name was again put at the end of the waiting list. He brought action against the Shipowners' Association of the Pacific Coast to recover damages for the violation of the Anti-trust Act, and also to obtain injunctive relief to prevent the Association

[12] No. 745—*Edelstein v. Goddard.* April 10, 1929.

and its members from combining for the purpose of maintaining this central employment agency, the effect of which, he claimed, was to restrain some 26,000 seamen from freely engaging in their occupation.

This case had previously come to the Supreme Court on the question whether the complaint stated a cause of action under the Anti-Trust Acts. The lower courts had dismissed the complaint, but the Supreme Court reversed that decision.[13] Then the Association modified its rules, and the lower courts held that under the rules as modified, there was no evidence of violation of the Anti-Trust Acts. Anderson maintained, however, that the second trial should have proceeded on the facts as of the date when his first suit was filed. On this question, he was overruled by the Circuit Court of Appeals for the Ninth Circuit, and the Supreme Court then declined to go into the matter.[14]

State Regulation

The state of Tennessee attempted to eliminate restraint of trade in the gasoline business in the state, by fixing the prices at which gasoline might be sold. The specific evil at which the state law aimed was the freezing out of small competitors by changes in prices and by price discrimination, but the act was declared unconstitutional.[15]

[13] *Anderson v. Shipowners Association*, 272 U. S. 359.

[14] No. 825—*Anderson v. Shipowners Association.* May 20, 1929.

[15] No. 64—*Williams v. Standard Oil Co. of La. et al.* Jan. 2, 1929.

The Tennessee law established a bureau known as the Division of Motors and Motor Fuels. It provided that the Superintendent of the Bureau shall make investigations and collect data as to the manufacture and sale of gasoline, the cost of the refinery process, freight rates, differentials and prices to the wholesale and retail dealers, expenses incident to the sale of gasoline, the methods of distribution and such other information as might be material in ascertaining what price would be fair and reasonable to be paid for gasoline by wholesale dealers, retail dealers and consumers.

The law further provided that no person may engage in the sale of gasoline within the State of Tennessee without having obtained a permit, and that no permit shall be issued except upon an application, in which the dealer showed compliance with the following requirements: (1) He must state whether he proposes to sell gasoline at wholesale or retail, or both; (2) he must give the number and locations of the places of business and the number of pumps to be operated; (3) he must give his name and address, the principal office, etc.; (4) the price at which he is selling the gasoline at the different locations; (5) the cost price of such gasoline to the dealer, including refinery costs, transportation, taxes, inspection fees, cost of depreciation and other costs; (6) the price at which the applicant proposes to sell the gasoline; and (7) such other information as the Superintendent may require.

The law required the Superintendent to issue the permits only to such applicants whose prices do not exceed a reasonable profit to the dealer, and if the Superintendent does not approve of the prices filed by the applicants, he may fix the price at which the gasoline may be sold. This action of the Superintendent may, under the law, be reviewed by the Commissioner of Finance, and the Commissioner's action may be reviewed by the courts. The act further provided that it shall be unlawful for any person engaged in selling gasoline in Tennessee to change his prices without the consent of the Superintendent.

The Standard Oil Company of Louisiana and the Texas Company brought suit in the United States District Court for the Middle District of Tennessee to enjoin the enforcement of this law. They maintained that the law fixed prices of a commodity which was not affected with the public interest, and that therefore the law was unconstitutional as depriving the gasoline dealers of property without due process of law and as depriving them of the equal protection of the law.

The District Court, consisting of three judges, granted the injunction, and the Commissioner of Finance of the State of Tennessee appealed the case to the Supreme Court. Here, the Oil Companies reiterated the arguments as to the due process and equal protection clauses of the Constitution. The Commissioner of Finance of the State of Tennessee

argued that, assuming that the price fixing feature of this law is unconstitutional the Act should not be declared unconstitutional in its entirety. He maintained that it is within the power of the State to require that gasoline dealers file information concerning prices; that they shall not change these prices without giving notice to the Superintendent, and that the law was designed to meet an evil which is within the police power of the State to abate. This evil which the law sought to remedy, the Commissioner maintained, is that the large oil companies, by means of change of prices and price discrimination, have been able to force the independent oil dealers out of the gasoline market.

The Supreme Court, however, declared the entire statute unconstitutional. With reference to the argument of the Commissioner that the Act should be held valid in so far as it merely required information to be furnished by gasoline dealers, the Court held that since the expressed object of requiring the information was to fix prices, the requirement for information was only an incident to the main object and must therefore stand or fall with the main object of the Act.

Unfair Competition

An outstanding decision upheld the powers of the Secretary of Agriculture to prohibit concerted action by dealers on stock yards from boycotting cooperative marketing associations. The dealers maintained that refusal to deal with the cooperative

associations was not unfair competition, that the co-operative associations had sold products of non-members, and therefore could not be protected by the Packers and Stockyards Act, and also that the burden of proof was on the Government to show that the co-operative association was not dealing in products of non-members. The Supreme Court held that the burden of proof in such cases was on the dealers to show that the cooperative associations were engaged in marketing the products of non-members.[16]

The constitutionality of provisions against unfair competition in the Tariff Act of 1922 was brought into question. The controversy, however, went off on a jurisdictional question. The Act provides that when the Tariff Commission finds the importation of a product would result in unfair competition, the Commission may recommend to the President that he put an embargo on that product. The Act provides, however, that the importer of the product may appeal from the findings of the Commission to the Court of Customs Appeals. In an appeal thus taken it was maintained that the provision permitting such appeal is unconstitutional, because it confers jurisdiction upon a court in a matter which does not present a "case or controversy".

The Supreme Court sustained the constitutionality of the provision, holding that the Court of Cus-

[16] No. 513—*United States v. American Livestock Commission Co.* May 20, 1929.

toms Appeals is not a constitutional court, and that therefore Congress may confer jurisdiction, assuming that the question involved did not present "a case or controversy" within the meaning of the Constitution.[17]

The sufficiency of the findings of the Federal Trade Commission was questioned by the Indiana Quartered Oak Company, when the Commission ordered the Company to cease and desist from advertising certain hard woods as "mahogany" or as "Philippine Mahogany". This order was sustained by the Circuit Court of Appeals, and the Company petitioned the Supreme Court to review the case, maintaining that the findings of fact, to be conclusive, must be based on "substantial" evidence. The Supreme Court, however, declined to go into the matter.[18]

During the term, numerous cases came before the Supreme Court involving suits for unfair competition between private parties. The offenses complained of were infringements of trade names, trade marks, patents, copyrights, enticing away employees for the purpose of learning the secrets of competitors, etc. In the great majority of the cases, however, the Supreme Court refused to disturb the decisions of the lower courts.[19]

[17] No. 17 Orig.—*Ex Parte: Bakelite Corporation.* May 20, 1929.

[18] No. 311—*Indiana Quartered Oak Co. v. Federal Trade Comm'n.* Oct. 15, 1928.

[19] For reference to cases on Unfair Competition, see *U. S. Supreme Court Service*, October Term, 1928, Subject Index, page LVII.

IX.

RAILROAD LABOR PROBLEMS

The Federal Employers' Liability Act, passed in 1908, for the relief of employees meeting with railroad accidents, or of those whose supporters are killed in railroad operations, has turned out to be a source of a great amount of litigation. The number of cases brought under the Act to the Supreme Court each year is indicative of the great amount of litigation in the lower courts throughout the country. No less than sixty such cases [1] were considered by the Court during 1928-29; more than the number of cases arising under any other Act of Congress (including the National Prohibition Act) and more than all other personal injury cases taken together. In other words, there is much too much litigation under this Act.

For after all, these cases are nothing more than personal injury cases which, one might well say, have no business before the Supreme Court of the United States. The mere fact that these cases do come to the Supreme Court in such numbers, is indicative of the fact that the law is not sufficiently simple and does not take adequate consideration of the problems involved in the relation between the carriers and their employees.

[1] For all the cases which came to the Supreme Court during the term under the Federal Employers' Liability Act, see *U. S. Supreme Court Service*, October Term, 1928, Subject Index pages XXXI-XXXIII.

The costs, both to the railroads and the employees, in administering the Act, and the uncertainties of the outcome of the litigation raise the question whether it is not time to consider the advisability of substituting a system of general insurance for the Employers' Liability Act, which, at the time of its enactment was looked upon as a progressive measure.

Chief Justice Taft, in addressing the American Law Institute [2] dwelt on this subject in the following terms:

> "A good many years ago it was attempted in Congress to provide a Workmen's Compensation Act, or what was equivalent to it, with reference to that great body of men whose lives are constantly at stake in the operation of the transporation systems of the country. We, in the Supreme Court, and all judges who have to do with the active conduct of litigation, realize the amount of time that is taken up in litigation of this kind, and also realize how much has been saved to the Courts of the country by these Workmen's Compensation Acts.
>
> "But we have no such system in the Federal Courts, *and we need it!* * * * If you look back, as we can, to the years since those acts were initiated, and think how much time might have been saved, and how much real good could have been done by introducing what is practically a system of general insurance to save life and limb and

[2] Proceedings of the American Law Institute, 1929.

widows by means of assistance after the death of the bread earner, I think you will be stirred to a movement of that sort. It failed, I am sorry to say, because of the spirit that actuated some of the opponents which has been restated with emphasis in the revelations that recently have been made in New York, in what has been called 'ambulance chasing investigation.'

"Now far be it from me to say that the Federal Bar has any ambulance chasers; but I think you might investigate, and if there are none, find it out." (Laughter)[3]

Jurisdictional Difficulties

The uncertainties of litigation in this Act are in a great measure due to complicated distinctions between interstate and intra-state commerce. The law provides that it shall be applicable to cases of death or injury arising out of interstate commerce. This means that not only must the employer be engaged in interstate commerce, but that the employee himself must be engaged in interstate commerce. The door is thrown open to a great deal of controversy as to whether at the given moment of injury, the employee was engaged in interstate or intra-state commerce.

[3] The general opinion prevails, among those favoring a workmen's compensation act for railroad employees that "ambulance chasers" had persuaded the railroad employees to oppose a workmen's compensation measure and to favor an employers' liability act.

The question of "interstate commerce" is one of the most difficult questions in our law. In the case of railroad operations, this problem is by far more complicated than otherwise, and to cause an employee's rights, under the Act to be determined by the question whether at a given moment he was engaged in interstate commerce, is, to say the least, to impose an insurmountable burden on the employee. This is especially so, because the foremost members of the Bar and the Bench are often in disagreement as to whether a particular act or transaction is interstate or intra-state commerce. In the course of railroad operations, employees working for interstate carriers, constantly shift from intra-state to interstate engagements. If at the time of his injury an employee was engaged in interstate commerce, he may recover compensation under the Federal Act. If, at the time of his injury, he was engaged in intra-state commerce, he may receive compensation under the State act, where the state has a compensation law, but at any rate he is without the operation of the Federal law.

A cursory examination of the cases coming to the Supreme Court on this question clearly shows the difficulties of distinction between interstate and intra-state commerce, and these difficulties themselves are a clear indication of the inadequacy of the Act in dealing with the needs of injured employees.

A railroad conductor was injured, while repairing the latch of an intra-state car which was

part of an interstate train.[4] The Illinois courts held that the employee was not entitled to recover damages under the Federal Employers' Liability Act, because at the moment of the injury, he was engaged in intra-state commerce. Had the repairs been required on the latch of another car in the same train, the conductor might have recovered under the Act. On the other hand, a switchman killed in the switching of cars brought from another state, some of which were destined for shipment in intra-state commerce, was held by the Supreme Court of Missouri to have been engaged in interstate commerce at the time of the accident, and his widow was allowed to recover damages under the Federal Employers' Liability Act.[5]

An employee engaged in cutting weeds along a railroad track,[6] and an employee, repairing a coupler on an intra-state car intended for an interstate train,[7] were held to have been engaged in intra-state commerce. But a railroad carpenter, cutting ties intended for a crane which was used for loading and unloading intra-state and interstate shipments,[8] was held to have been engaged in interstate commerce.

[4] No. 639—*Foreman Trust & Savings Bank v. Grand Trunk Western Railway Co.*, February 25, 1929.

[5] No. 256—*Terminal Railroad Association of St. Louis v .Potterfield*, October 15, 1928.

[6] No. 184—*Southern Pacific Co. v. Industrial Comm'n of Utah*, October 8, 1928.

[7] No. 308—*Cora A. Poindexter v. Cleveland, Cincinnati, Chicago & St. Louis Railway Company.*

[8] No. 685—*Lehigh Valley Railroad Co. v. Egyed*, April 8, 1929.

Where intra-state commerce ends, and interstate commerce begins, is indeed puzzling. The question provides a fruitful battleground for legal minds, but is not conducive to a simple solution of workman's compensation for injuries or death. For purposes of illustration it may not be amiss to mention a case which came to the Supreme Court in the preceding term.[9]

An electric welder was electrocuted while repairing cracks in a boiler, and his administrator brought action under the Federal Employers' Liability Act. The outcome of this case depended on whether the engine at the time of the accident was undergoing "classified" or "running" repairs. If the former, then it meant that the engine had been taken out completely from interstate commerce and no recovery could be had under the Act. If the latter, it meant that the engine was temporarily withdrawn but was still intended for interstate commerce. In this case, the engine had been taken out of service for running repairs. Later it developed that additional classified repairs were necessary. It so happened that the lower court ruled that at the time of the accident the engine was still in interstate commerce, and the Supreme Court denied the railroad's application to review the case. It might well have happened, however, that the welder be electrocuted very shortly after it was determined that the engine was to undergo some classified repairs, in which case the lower courts would undoubt-

[9] *St. Louis-San Francisco Railroad Co. v. Oglesby*, 277 U. S. 587.

edly have held that the welder was engaged in intra-state commerce at the time of his death, and that therefore no recovery could be had under the Federal Employers' Liability Act.

Whatever may be said of the merits or demerits of the decisions, or of the difficulties of the question, it may well be concluded that, if an employee's compensation is dependent on such accidental facts, as whether one car or another needed repairs, or whether certain empty cars had or had not been classified, or whether the particular repairs on an engine had been determined at one moment or another, the law is too uncertain to be deemed practicable as a means for allowing compensation to employees who constantly shift from interstate to intra-state operations.

The jurisdictional difficulties under the Act are not limited to the question of interstate commerce. An interesting case [10] came from New York, in which the Supreme Court ruled that where an employee brings an action under the Act in the state courts, the latter may, in their discretion, refuse to take jurisdiction, if both the employee and the railroad are not residents of the state.

Negligence Must be Proven

Nor are the jurisdictional difficulties the only problems arising under the Act. The Federal Employers' Liability Act left intact the old doctrine

[10] No. 312—*Charles L. Douglas v. New York, New Haven & Hartford Railroad Company*, May 13, 1929.

of assumption of risk, the doctrine of negligence, and to some extent, the doctrine of contributory negligence, except where the injury or death results from the railroads' violations of the Safety Appliance Act, or the Boiler Inspection Act.

When an employee or his administrator sues to recover under the Federal Employers' Liability Act, he must prove that the injury resulted from the negligence of the railroad or his agents. It is often difficult to prove negligence on the part of the railroad, especially since in railroad operations, it is not always possible to take cognizance of the circumstances surrounding the accident. For example, a railroad employee cannot always choose to be killed while others are watching him, or when a railroad worker falls from a car, he cannot always cry out: "Watch me boys, I'm falling." It so happened, that while a train was engaged in switching operations, a fireman climbed to the top of the tender to pour a bucket of compound into it. Shortly afterwards, his body was found under the tender, crushed and mutilated. No one saw the accident. The Supreme Court therefore held that since there was no evidence of negligence, the railroad was not liable under the Act.[11]

There was also the case of a repairman who, while walking toward the tool house on a path close to the tracks, was run over and permanently injured. All he knew was that something struck him.

[11] *Ft. Smith, Subiaco & Rock Island Railroad Co. v. Moore*, 276 U. S. 593.

He could not prove exactly what struck him, or what was the cause of the injury. He therefore could not recover damages under the Federal Employers' Liability Act.[12]

Another railroad worker was struck and killed by a semaphore as he was climbing to the top of a box car. His widow could not recover compensation, because there was no proof of negligence in the construction of the semaphore.[13] Likewise, an employee who fell into an uncovered ditch while alighting from a train, failed to recover damages, because the ditch was part of the drainage system in the railroad yard, and it was not shown that the railroad had been negligent in keeping the ditch uncovered.[14]

A night yard conductor was shot and wounded when he surprised a number of robbers in the railroad yard. He maintained that the company had been warned of the presence of thieves and robbers in the yard and that the company had not taken sufficient care to guard the premises, and that therein the railroad had been negligent. His contentions were sustained by the Supreme Court of South Carolina, but its decision was reversed by the Su-

[12] No. 197—*P. N. Salisbury v. Atchison, Topeka & Santa Fe Railroad Co.*, October 8, 1929.

[13] No. 62—*Atlantic Coast Line Railroad Co. v. Tyner*, October 29, 1928.

[14] No. 219—*Delaware, Lackawanna & Western Railroad Co. v. Koske*, February 18, 1929.

preme Court of the United States on the ground that the criminal act of the robbers, could not be imputed to the railroad.[15]

Negligence Cannot Be Presumed

It is an established rule that the negligence of the railroad or its agents must be proven. It cannot be presumed from the circumstances of the case, and in the past term, the Supreme Court held that where a state makes a particular circumstance, negligence in itself, the existence of that circumstance does not make the railroad liable under the Federal Employers Liability Act.[16] In that case, the railroad had employed a lad under the age of sixteen, contrary to the Child Labor Law of Kentucky. The courts of Kentucky held that the employment of the boy was negligence in itself, and that therefore, when the boy was injured, the railroad was liable under the Federal Employers Liability Act. The Supreme Court reversed this decision, holding that proof of actual negligence was a necessary condition to recovery under the Act.

Negligence of Employee Bars Recovery

If an employee is negligent, on his own part, he cannot recover damages for injuries under the Federal Employers Liability Act. Thus, it happened

[15] No. 495—*Atlanta & Charlotte Airline Railway Company v. Green*, April 22, 1929.

[16] No. 133—*Chesapeake & Ohio Railway Co. v. Stapleton*, May 27, 1929.

that a flagman, assisting in excavation work, placed himself on the jackarm of a steam shovel, acting as a "spotter," in order to signal the railroad's engineer who moved the cars in place to receive the loads. As he was standing there, he was crushed to death by the boom of the shovel. It was held that, since he was negligent in placing himself in a position of danger, his administrator could not recover damages for his death.[17]

If an employee is only contributorily negligent, then the rule is to apportion the damages in accordance with the degree of negligence of the injured employee and of the railroad. But the line of demarcation between contributory negligence and sole negligence on the part of the employee is very indistinct. An interesting case on that question came from the state of New York, where the Court of Appeals held that a railroad conductor was only contributorily negligent in starting his train without waiting for a freight train which was to take a siding and let his passenger train pass. The evidence showed that on the morning of the accident, the conductor of the freight train had telephoned the station agent to hold the passenger train until the freight train had arrived. This message was not delivered to the conductor, who signalled the engineer to go ahead. A head-on collision occurred, in which the conductor was killed. The New York courts allowed the father of the conductor to recover

[17] No. 70—*Atlantic Coast Line Railroad Co. v. Davis*, February 18, 1929.

$2,000 for the death of the son. This was reversed by the Supreme Court, which held that disobedience of the railroad's printed rules was the sole cause of the accident.[18]

The cases involving contributory negligence give rise to a difficult and puzzling situation. The law provides that the jury shall reduce the amount of damages in proportion to the employee's negligence. Precisely what this means and by what process of reasoning juries apportion the amounts of damage due to the negligence of the employee and to that of the railroad, is indeed a puzzle.

Assumption of Risk

If an employee is injured without being negligent, he may still be denied compensation under the doctrine of assumption of risk. This is the most important difficulty for railroad employees in the application of the Federal Employers Liability Act. When an employee enters upon his employment he is said to assume the risks incident to that employment. Thus, where a switchman was killed, having been struck by a semaphore as he was climbing to the roof of the car, his administrator could not recover damages for the benefit of the wife and children, for the reason that this was a risk incident to his employment.[19] But in a similar case where a foreman of a switching crew was struck by a switch

[18] No. 73—*Unadilla Valley Railway Co. v. Caldine*, December 10, 1928.

[19] No. 62—*Atlantic Coast Line Railroad Co. v. Tyner*, October 29, 1928.

stand, while riding on the steps of the tank of an engine, the Supreme Court of Missouri overruled the railroad's contention that the employee had assumed the risk, and the Supreme Court declined to review the case.[20]

In addition to the risks ordinarily incident to the employment, the employee is said to assume extraordinary risks, or even the negligent acts of the railroad, if those risks are known to him or reasonably should be known to him. Thus, in the case of the switchman who fell into an uncovered and unlighted ditch in the railroad yard, the Supreme Court held that he could not recover damages for his injuries because he had assumed the risk. The defense was that the ditch was part of the drainage system in the yard, had been there for at least ten years before the accident, and that the employee was aware of the presence of the ditch, or at any rate should have been aware of it.

This type of assumption of risk is closely connected with still a third type, in which employees are held to have assumed the risks of their employment, on the theory that the risk is dependent upon the length of employment. The more experienced an employee becomes, the greater are the risks which he assumes. Thus, it was held that a car inspector assumed the risk when a piece of steel flew into his eye and blinded him, as he was tapping a

[20] No. 373—*Wabash Railway Company v. Westover*, October 22, 1928.

car wheel.[21] This inspector had been employed by the railroad for about fourteen years, and it was held that, as an experienced employee, he should have known enough to use the wheel guage, rather than a hammer, in testing the wheel, and that the injury therefore resulted from the risk assumed by him as an experienced employee.

This third type of assumption of risk often merges into the question of contributory negligence. The problem here is important, for under the Act, the railroad employee can recover something, though he is contributorily negligent, but he cannot recover at all, if it is held that he has assumed the risk.

Exceptions Under the Safety Appliance Act Limited

Under the Federal Employers' Liability Act, if injury or death results through the railroad's violation of the Safety Appliance Act, the defenses of contributory negligence and of assumption of risk may not be set up by the railroads. This provision in the Act, however, has been interpreted to mean that the violation of the Safety Appliance Act must be shown to have been the proximate cause of the injury or death. The foreman of a switching crew noticed that a lug was missing in a coupler. As he was inserting the lug, an uncoupled car collided with the car he was repairing, and killed him. The railroad argued that the defective coupler was not the

[21] No. 327—*Stapleton v. Reading Co.*, October 22, 1928.

proximate cause of the injury, but rather the unexplained movement of the other car. The Supreme Court of Missouri sustained the railroad's contention, and the Supreme Court declined to disturb that decision.[22]

In another case, an employee climbed upon a locomotive to hang a lantern upon a hook provided for the purpose, because the railroad had failed to maintain a head light on the rear of the engine. The employee slipped and fell, and was killed. The widow brought action under the Federal Employers' Liability Act and the Federal Boiler Inspection Act. The Supreme Court of Georgia found that the failure to maintain a headlight was not the proximate cause of the death, and held in favor of the railroad, and the Supreme Court declined to grant a writ of review in the case.[23]

[22] No. 310—*Illinois State Trust Co. v. Missouri-Pacific Railroad Co.*, October 15, 1928.

[23] No. 790—*Watson v. Georgia Southern & Florida Railway Co.*, April 29, 1929.

X

THE JONES SEAMEN'S ACT

By Section 33 of the Merchant Marine Act of 1920,[1] commonly known as the Jones Seamen's Act, the remedies given to railroad employees under the Federal Employers' Liability Act were made applicable to seamen injured or killed in the course of their employment. The Act in effect abrogated the limitations on the rights of seamen under the old admiralty rules, and gave them or their administrators the right to recover damages for injury or death resulting from the negligence of their employers or fellow employees.

Under the old admiralty rules, a seaman was not allowed to recover an indemnity for injuries sustained through the negligence of a fellow servant. The Federal Employers' Liability Act abrogated this fellow servant doctrine and allowed recovery in the case of railroad employees. As late as the 1927 Term, a case came to the Supreme Court from the Circuit Court of Appeals for the Fifth Circuit, in which that Court held that a stevedore could not recover for his injuries upon an allegation that these had resulted from the negligence of a fellow servant. But the Supreme Court reversed this decision, holding that the fellow servant doctrine no longer applied.[2]

[1] 41 Stat. 988.

[2] *Karl Buzynski v. Luckenbach Steamship Co., Inc., et al.*, 277 U. S. 226.

This case, however, came back to the Supreme Court during the 1928 Term, only to illustrate that under the Jones Act, as in the cases arising under the Federal Employers' Liability Act, the negligence of the employer must be proven. The facts here showed that a winchman had left a winch unattended and in such condition that it started automatically and injured the stevedore. The accident happened only a few minutes after the stevedore began his work of loading the vessel. The Court of Appeals held that the cause of the accident was entirely speculative, and reversed the judgment of the trial court. The injured stevedore then again petitioned the Supreme Court to allow him to proceed *in forma pauperis,* but the Supreme Court held that upon examination of the record there was no basis upon which a writ of review could be issued, and therefore his petition was denied.[3]

In addition to abrogating the fellow servant doctrine, the Federal Employers' Liability Act abrogated in part the defense of contributory negligence, but left intact the defense of assumption of risk. In two cases which came before the Supreme Court in the 1927 Term, the lower courts had held that the seamen had assumed the risks which resulted in death or injury. In one case a longshoreman who was stacking a cargo of pilings aboard a barge was struck and killed by a plank used as a

[3] No. 905—*Buzynski v. Luckenbach Steamship Co.* May 27, 1929.

platform, upon which the pilings were landed. The Supreme Court of the State of Washington, where action was brought, held that the employee had assumed this risk even though the employer was negligent in the construction of the platform.

In the other case a stevedore employed in loading bars of copper was injured, having slipped on a grease spot on the floor of the hatch where he was working. Before the injury occurred, the stevedore had noticed the grease spot and had called it to the attention of his foreman. The latter told him to continue working and that sawdust would be sent down to cover the grease. The Supreme Court of New York held that since the employee knew of the negligent condition, he had continued to work at his own risk. In both cases the Supreme Court declined to review the decisions of the State Courts.[4]

On the other hand, in a case which came to the Supreme Court in the 1928 Term, a coal passer, who was injured when he stumbled over a jackscrew left on the deck, was held not to have assumed this as a risk incident to his employment. The steamship owner argued that it was customary to leave the jacks on the decks and that the worker had therefore assumed this risk, but the courts of Michigan allowed recovery, and the Supreme Court declined to disturb their decision.[5]

[4] *Lena Kahlstrom v. International Stevedoring Co.*, 275 U. S. 560. *Guiseppe Yaconi v. Brady & Gioe, Inc.*, 276 U. S. 636.

[5] No. 829—*Pere Marquette Railway Co. v. Russell.* May 20, 1929.

The Jones Act also had its effect on the measure of compensation to which an injured seaman might be entitled. Under the old admiralty rules, a vessel and her owner were liable, in case a seaman fell sick or was wounded in the service of the ship, to the extent of his maintenance and cure, and to his wages so long as the voyage continued. If the injury was caused through the unseaworthiness of the vessel, then the employee was entitled to compensation for his injuries, but he was not allowed to recover an indemnity for injuries sustained through the negligence of the Master or any member of the crew. Under the Jones Act, the employee became entitled to the same measure of damages as is allowed to railroad employees under the Federal Employers' Liability Act. Thus a seaman, who received medical care and wages after his injury, was held not precluded from recovering damages for his injuries.

This seaman was working as a boatswain, when a heavy sea came over the stern of the ship, knocked a box of clams against him and injured his knee. He was immediately taken to the marine hospital, and the owner of the vessel paid for his maintenance and cure. He also received his wages to the end of the voyage, which amounted to about $41.

Shortly afterwards the seaman brought suit in the state courts of Washington under the Jones Act to recover damages for the injury sustained. The Steamship Company defended on the ground that, by having accepted the medical care and wages, the

seaman had elected to be thus compensated for his injuries and that his action therefore could not be maintained. The trial court ruled in favor of the seaman who received a judgment of $12,500. This was affirmed by the Supreme Court of Washington, and finally by the Supreme Court of the United States.[6]

The measure of compensation recoverable by an injured seaman under the Jones Act may, however, be affected by the Harter Act, limiting the owner's liability to the amount of his interest in the vessel and her freight, and that despite provisions in the state laws making the owners otherwise liable. For example, under the Constitution and laws of California, stockholders of a corporation are individually liable for the wrongs of their corporation, and the question was raised whether they are entitled to limitation of liability under the Harter Act.

A seaman was injured while working on a vessel. He commenced actions against the owner corporation, both in the Federal and in the State Courts, claiming damages for his injuries under the Jones Law. At the same time he commenced actions against the stockholders of the corporation, under the constitution and statutes of California, for the tort of the corporation.

These stockholders brought suit in the United States District Court in California for limitation of their liability with respect to the vessel, under the

[6] No. 49—*Pacific Steamship Co. v. Carl G. Peterson.* Nov. 26, 1928.

Harter Act. An appraisement disclosed that their interest in the vessel was some $2,000 at the close of the voyage in which the seaman was injured. The proceedings in the actions brought by the seaman were stayed, but on motion of the seaman, the stay was vacated. The District Court held that the stockholders were not entitled to the benefits of the Harter Act. On appeal, the United States Circuit Court of Appeals for the Ninth Circuit reversed the decision of the District Court, holding that the stockholders were entitled, under the Admiralty Law, to a limitation of liability, and that the Stockholders' Liability Law of California, as applied in this suit, was in conflict with the General Admiralty Law of the United States, and was therefore inapplicable.

The seaman brought his case to the Supreme Court, which affirmed the decision of the Circuit Court of Appeals.[7] The Court held that the Harter Act was intended to benefit those engaged in navigation and was applicable to stockholders of a corporation as well as to the corporation itself.

Conflict Between Federal and State Jurisdiction

Under the Federal Employers' Liability Act, the question often arises whether the employee, at the time of the injury was engaged in interstate or intra-state commerce, in order to determine whether the employee's proper remedy is under the Federal Act or under the State Workmen's Compensation

[7] No. 299—*Flink v. Attilio Paladini, et al.* March 5, 1929.

law. This conflict between the State and Federal jurisdiction is even more pronounced in actions brought for the death or injury of seamen.

It is established that where the employment is non-maritime in character, and the injury occurs on land, recovery may be had under the State Compensation Laws. It is only where the injury occurs on navigable water, and the contract of employment is maritime in character that recovery under the State Act may be excluded. The reason for excluding remedies under the State laws in such cases is that the State law then becomes a burden on navigation, or it is held to disturb the uniformity of the general maritime jurisdiction of the United States.

Thus where a carloader was killed while working in the hold of a ship on the Great Lakes, the Supreme Court held that his widow could not recover death benefits under the State Compensation Act.[8] The carloader was employed by a coal and dock company engaged in the mining and selling of coal and in operating a coal dock on Lake Superior. The widow filed a claim with the Wisconsin Industrial Commission for death benefits under the Workmen's Compensation Act of the State. An award was allowed, and the Company appealed to the Wisconsin Courts. It argued that the Commission had no jurisdiction in the case, and that the State Act could not apply, because at the time of the injury which

[8] No. 41—*Northern Coal & Dock Co., et al. v. Emma Strand, et al.* Dec. 10, 1928.

resulted in death, the employee was engaged as a stevedore, and the Jones Seamen's Act, if any, should govern the case.

The Wisconsin Courts upheld the jurisdiction of the Commission and sustained the award, basing their decision on the Act of Congress of March 30, 1920, which legislated on the general subject matter of death on the high seas, but which provided that "the provisions of any state statute giving or regulating rights of action or remedies for death shall not be affected by this act nor shall this act apply to the Great Lakes or to any waters within the territorial limits of any state. * * *"[9] The Supreme Court of Wisconsin held that the proper remedy of the widow was under the Wisconsin Wrongful Death Statute.

The Supreme Court, in an opinion by Mr. Justice McReynolds, held that the State had no power to impose upon an employer liabilities of this nature in respect to men engaged to do work of stevedores on ship board. The Court held that the remedy under the Jones Act in such cases is exclusive.

In a similar case from the State of California, the Supreme Court likewise reversed the decision of the State Courts. Here, an employee was drowned in the course of his employment on a pleasure fishing boat. He was working for a corporation operating a small fleet of fishing vessels on Santa Monica Bay, California, for the accommodation of the people seeking recreation in deep sea fishing. The em-

[9] 41 Stat. L. 537.

ployee's parents brought their claim before the Industrial Accident Commission of California, which awarded no compensation to them, except $150 for funeral expenses, but the insurer of the employer corporation objected to the jurisdiction of the Industrial Accident Commission on the ground that the case came entirely within the exclusive maritime jurisdiction of the United States.

The Commission held that the deceased was not engaged in any maritime employment, nor was he performing a maritime service under a maritime contract at the time of the accident, nor was the employer engaged in any maritime business or industry. The California Courts sustained the jurisdiction of the Commission, but the Supreme Court reversed their decision, holding that the remedy in question was exclusively within the maritime jurisdiction of the United States.[10]

In the above-mentioned case of the stevedore who was killed while in the hold of the vessel, Mr. Justice Stone, with whom Justices Holmes and Brandeis concurred, wrote a separate opinion. He agreed with the majority of the Court in the result reached, but maintained that the decision seemed to go too far, since it implied that not only stevedores but any workmen, who are not seamen, and therefore are not given a remedy by the Jones Act, are excluded from the benefits of the state compensation acts. Justice Stone, particularly stressed the situation of

[10] No. 491—*London Guarantee & Accident Co. v. Industrial Commission of California.* April 8, 1929.

such workmen, who are regularly employed in non-maritime employment, but who occasionally work on a ship. In such cases, he maintained, the State Compensation Act should be held not to be inapplicable.

The propositions expressed by Justice Stone will be decided by the Supreme Court in two cases which came before it toward the end of the term, and which are still pending.

In one case, a blacksmith helper was injured while painting angle irons in the boiler room of a steamship while on navigable waters. The Workmen's Compensation Board in Pennsylvania awarded compensation, and the employer and the latter's insurers questioned the jurisdiction of the Board. They maintained that since the accident occurred on navigable waters, the remedy of the employee was exclusively within the jurisdiction of the United States. The Pennsylvania courts sustained the jurisdiction of the Commission and the validity of the award, and the case was appealed to the Supreme Court.[11]

In the other case, an employee was regularly employed in an assembling plant of an automobile manufacturer. Occasionally, he was ordered to help in unloading automobile parts on a vessel. He was injured in the hold of the vessel on navigable waters

[11] No. 810—*John Baizley Iron Works v. Abraham Span.* (Case still pending, No. 62, Oct. Term, 1929.)

while unloading such automobile parts. Again the Workmen's Compensation Board of the State of Texas granted an award, and the insurers of the employer removed the case to the Federal courts, arguing that the Compensation Board had no jurisdiction. The Circuit Court of Appeals for the Fifth Circuit sustained the jurisdiction of the Compensation Board, and the case is now before the Court on a writ of review.[12]

The reason for the conflict between state and federal jurisdiction in the cases of employees working on vessels is the same as in the cases arising under the Federal Employers' Liability Act. Under the federal acts, the employee or his administrator must prove that the injury was caused through the negligence of the employer or of the fellow servants. Where negligence cannot be proven, the only hope of the injured employee is to resort to the state statutes.

Those employees who are injured on navigable waters, and who do not come within the provisions of the Jones Act may still resort to their remedies at common law, "where the common law is competent to give it."

An acetylene welder, employed on a vessel, was injured while on navigable waters near Norfolk, Va. As he reached out for an electric light, he received

[12] No. 81 (Oct. Term, 1929)—*Employers' Liability Assurance Corp. v. Mrs. Myrtis Cook.* (Case still pending.)

an electric shock which threw him on the steel floor of the boiler room, causing him serious and permanent injury. He brought action at common law against his employer in the Virginia Courts, under the provision in the Judicial Code conferring admiralty jurisdiction on the federal courts, but "saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it."

The Company defended on the ground that the State Industrial Commission had exclusive jurisdiction in the case, and that the State had abolished all common law remedies in personal injury cases arising out of the relation between the employer and the employee. The welder recovered a judgment of $35,000 in the Virginia Courts, and the Company petitioned the Supreme Court to review the case, but the writ of review was denied.[13]

Where the State Compensation Acts have abolished the common law remedies, then the employee (not a seaman) who is injured while working on a vessel in navigable waters, is without remedy. He is, one might say, in "no man's land." A case of this character was presented by a pipe-fitter who was injured on a tug boat belonging to a railroad company. He brought action at common law in the New Jersey Courts, alleging that the accident was due to the negligence of his employer.

[13] No. 646—*Colonna Shipyard, Inc. v. I. F. Dunn.* Feb. 25, 1929.

The New Jersey Courts dismissed his suit on the ground that the tort in question was a maritime one, which could be brought in admiralty only, and over which the New Jersey Courts have no jurisdiction; and that he could have no common law remedy in the State, since the Workmen's Compensation Act of the State abrogated all common law actions arising out of injuries to employees.

In his petition to the Supreme Court, the injured worker argued that insofar as the State Compensation Act deprived him of his common law remedy in the State Courts for a maritime tort, the Act was in conflict with the above provision in the Judicial Code, "saving to suitors in all cases the right of common law remedy, where the common law is competent to give it." The Supreme Court, however, declined to review the case.[14]

The largest class of employees who had found themselves without right of recovery for injuries were the longshoremen. These workers are not seamen and therefore they do not come within the benefits of the Jones Seamen's Act. On the other hand, they performed work of a maritime character, and therefore in case of injury (on navigable waters) could not recover under state statutes. The remedies at common law, such as there were, had been abrogated in many states. Two attempts on the part of Congress to provide compensation for

[14] No. 628—*Davey v. Delaware, Lackawanna & Western R. R. Co.* Feb. 5, 1929.

these workers were held unconstitutional by the Supreme Court.[15] Finally, the Longshoremen's and Harbor Workers' Compensation Act was passed in 1927.[16]

The constitutionality of this law was questioned in the Supreme Court during the 1928 term. A longshoreman working for a steamship company was injured while unloading a vessel. He filed suit to recover for his injuries in the Supreme Court of New York, alleging that the accident occurred through the negligence of the company. The Steamship Company moved to dismiss the case, on the ground that the Longshoremen's and Harbor Workers' Act provided a remedy in such cases by applying for compensation to the United States Employees' Compensation Commission.

The longshoreman maintained that the Longshoremen's Compensation Act is unconstitutional, because the Constitution vests in the United States Courts exclusive jurisdiction in admiralty matters, and the Act is therefore an unconstitutional delegation of judicial power; that the Act deprived him of life, liberty, or property, without due process of law, contrary to the Fifth Amendment of the Constitution; that it is contrary to the Seventh Amend-

[15] Act of Oct. 6, 1917, 40 Stat. L. 395; Act of June 10, 1922 (42 Stat. L. 634). See *Southern Pacific Co. v. Jensen*, 244 U. S. 205; *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149; *Washington v. Dawson*, 264 U. S. 219.

[16] Act of March 4, 1927 (44 Stat. L. 1424).

ment of the Constitution providing for a jury trial where the value of the controversy exceeds $20; and that the Act is class legislation, since the work of longshoremen is maritime in its nature and these workers should therefore be entitled to the same benefits allowed to seamen under the Jones Act.

The New York Courts upheld the law. The longshoreman petitioned the Supreme Court to review the case, but his petition was denied.[17]

[17] No. 412—*Joseph Chernik v. Clyde Steamship Co.* Oct. 22, 1928.

XI

CRIMINAL CASES

"We have become a criminal court, not so much in the cases we hear, as in the cases we decline to hear," Chief Justice Taft recently said, addressing the American Law Institute.[1] Indeed, of 859 cases disposed of by the Supreme Court in the year 1927-28, 101 cases involved criminal prosecutions; and during 1928-29, of the 825 cases disposed of, 88 were criminal cases. Hearings were held in only 8 of the 88 cases; in 78 of them the Court declined to review the decisions of the lower courts; and two cases were dismissed on motion of the appellants. This in a sense reflects the merits of the criminal cases brought to the Supreme Court.

In only two of the 101 criminal cases disposed of in 1927-28 were the decisions of the lower courts reversed. One was reversed in favor of the Government;[2] the other in favor of the accused.[3] In other words, in only one of the 101 cases was the defendant successful, and that, not because he was innocent, but because the evidence against him had been unlawfully obtained. During the past term (1928-29), in only one criminal case was the decision of the lower court reversed.[4] This was a case

[1] Proceedings of the American Law Institute, 1928.

[2] *United States v. Goldman et al.*, 277 U. S. 229.

[3] *Gambino and Lima v. United States*, 275 U. S. 310.

[4] No. 429—*Manley v. Georgia.* Feb. 18, 1929.

in which the Banking Law of Georgia was held unconstitutional, in so far as it imposed the burden of proof on the officers and directors of banks to show, in case of insolvency, that the same had not been caused fraudulently.

In two other cases were the accused successful during the past term. In one of these [5] a Refrigeration Company was prosecuted under the provision in the Interstate Commerce Act making it unlawful to falsify railroad records. The Government alleged that the Company furnished false bills to an interstate carrier, charging for ice which it had not delivered. The United States District Court, where the action was brought, held that the statute was applicable only to the railroads or their employees, but that it had not made punishable the furnishing of papers to a railroad, which papers are afterwards incorporated into the railroad's records. The Government appealed to the Supreme Court, which, however, affirmed that decision. It held that a criminal statute must be interpreted strictly in favor of the accused, and that the wording of this statute did not admit of an interpretation which would make the Refrigeration Company criminally liable.

The second case [6] came to the Supreme Court on a petition to review the decision of the Supreme Court of California, holding that the State had no criminal jurisdiction over offenses committed on a

[5] No. 305—*United States v. Fruit Growers Express Company.* May 13, 1929.

[6] No. 241—*California v. Mouse.* Oct. 15, 1928.

federal reservation. In this case the defendant was indicted on two charges of infamous crimes against nature, alleged to have been committed at the National Home for Disabled Volunteer Soldiers in Los Angeles. He was convicted and sentenced, but the judgment of the trial court was reversed. The State petitioned the Supreme Court to review that decision, but the petition was denied.

In the remaining 85 cases, the decisions of the lower courts were against the accused. These decisions were either upheld by the Supreme Court, or the Court declined to go into the matter altogether. This is also a reflection on the merits of the criminal issues brought to the Supreme Court, considering that even in the three cases which resulted in favor of the accused, the decisions were based on general questions of law which did not relate to the innocence of the defendants.

Expedition of the Criminal Docket

The Chief Justice, continuing the above statement to the American Law Institute, said: "We in our court have determined that those gentlemen who have been unfortunate enough to have been convicted in the state courts and in the lower federal courts are not going to have a period of rest and contemplation, before they begin to serve the state, in a close relation to us, and we, therefore, are advancing every criminal case that comes into court. When we adjourn for the summer we shall have heard every case on the docket of a criminal char-

acter.'' When that term of the Court came to a close, not only had all criminal cases been heard, but all, except one, had been decided.

The expedition of the criminal docket is in line with the Court's general plan to expedite its work. Recently, however, the Supreme Court adopted a practice for further expediting criminal cases coming before it. As soon as such case is filed, it is subjected to a preliminary consideration. If the Court sees a meritorious issue in the case, the same is advanced on the calendar. If, however, there is apparently no merit in the appeal or petition, the Court dismisses the case. Immediately after the decision is rendered, the mandate of the Court is forthwith transmitted to the court below.

An unprecedented speed record in the disposition of a petition for a writ of certiorari in a criminal case, was made toward the close of the 1927 term (in June 1928), in the case [7] of three men sentenced to die for the murder of a policeman in the District of Columbia. The defendants were not quite satisfied with the definition of ''murder'' given by the trial court in instructing the jury. They appealed to the Court of Appeals of the District of Columbia, which found no error. They then petitioned the Supreme Court for a review. The petition was presented shortly before the adjournment of the Court, scheduled for June 4th, 1928. On that day, the Government waived its right to file a brief in opposition, and moved that the petition be forthwith acted upon.

[7] *Eagles et al. v. United States*, 277 U. S. 609.

The Court postponed its adjournment until the next day, when the petition was denied.

Offenses Against the States

Nineteen of the 88 criminal cases disposed of by the Supreme Court during the past term involved offenses against the states. In two of these cases hearings were held; in one case, hearings were commenced, but the Court declined to hear further argument and dismissed the case for lack of a substantial federal question. The remaining 16 cases were not reviewed.

The most important of the criminal cases in this class was that in which the Supreme Court upheld the Walker Law of New York.[8] This law required all organizations, having a membership of twenty or more and requiring the taking of an oath for admission to membership, to file with the Secretary of State such information as membership lists, copies of the oaths, constitutions, etc. The law, by its terms, exempted labor unions and benevolent associations from these requirements.

In Buffalo a member of the local organization of the Ku Klux Klan was arrested, because he attended a meeting of the Klan knowing that his organization had not complied with the provisions of the Walker Law. He applied for a writ of habeas corpus in the courts of New York. The writ was denied, and he brought the case to the Supreme Court, claiming that the statute under which he was put under ar-

[8] No. 2—*New York ex rel Bryant v. Zimmerman.* Nov. 19, 1928.

rest was unconstitutional in that it interfered with the freedom of assembly, denied him the privilege and immunity of belonging to a secret order, and denied him the equal protection of law, since the same requirements were not applied to labor unions and to benevolent associations.

The Supreme Court upheld the constitutionality of the law, concluding on the facts found by the Court of Appeals of New York, that there was a reasonable distinction between an organization like the Ku Klux Klan and those secret organizations which do not work at night, terrorizing people in an effort to promulgate their purposes. The court, therefore, held that the statute was not a denial of the equal protection of the law. It also held that belonging to a secret order is not a privilege or immunity guaranteed by the Constitution, and that the freedom of assembly is subject to the limitations which may be imposed by the state in the proper exercise of its police powers.

The next case of importance was the one in which the Georgia banking law was declared unconstitutional.[9] Here the president of a bank was sentenced to a penitentiary for a period of ten years, because he could not refute, to the satisfaction of a jury, the presumption raised by the law that when his bank became insolvent, the insolvency was fraudulently caused by him. This law defined insolvency by enumerating various instances thereof, and one of these instances was the bank's inability to meet

[9] No. 429—*Manley v. Georgia.* Feb. 18, 1929.

the demands of depositors. Under the law of Georgia, banks are permitted to lend money up to 85% of their reserves, so that unforeseen demands on a bank by its depositors may at any time cause it to be insolvent. Under such circumstances, to raise a presumption of criminal fault, the Court held, is not due process; there is no reasonable connection between the thing presumed and the fact to be proved.

This decision has already had its effect beyond the field of criminal law. Later in the term, the Supreme Court held unconstitutional the law of the State of Georgia making railroads liable for injuries caused through the operation of their trains, unless the railroad could show that its agents had at all times exercised reasonable care.[10] This case grew out of a grade crossing collision, and the Supreme Court, after reviewing the facts, held that there was no reasonable connection between the operation of the train and the negligence presumed, which formed the basis of the railroad's liability under the Law.

The New York Education Law was attacked by a parent who refused to send his son, between the ages of 14 and 18, to a continuation school as required by the law.[11] The boy was sixteen years old and was employed during the daytime in a law office and the father put the boy into a night preparatory school

[10] No. 519—*Western & Atlantic Railroad v. Henderson.* May 27, 1929.

[11] No. 352—*Braunstein v. New York.* Dec. 10, 1928.

so that he might more easily prepare himself for admission to a law school. The father testified that his son earned $12 a week, of which he contributed $7.00 to the family income, and that if his son attended a continuation school, he could not retain his present position. Further testimony showed that in the continuation school which the boy had attended for some time, he had received instruction in printing and in typewriting, whereas in the preparatory school he was able to obtain instruction in all the subjects which were required for admission to a law school.

The father was convicted on the charge of violating the Education Law. The Appellate Division, by a vote of three to two, affirmed the judgment, but one of the judges who voted in favor of the conviction stated that he had "some doubt that the requirement of attendance in the daytime is reasonably necessary to accomplish the purpose of the statute, in light of the established policy of the state to provide for education at night." The law was upheld unanimously by the Court of Appeals of New York.

The appellant then brought the case to the Supreme Court. He argued that the purpose of the statute was unjustifiable, that it was not a proper exercise of the police power and that it was, therefore, without due process. He characterized the Education Law of New York as being neither an education law, nor a health law, nor a labor law. He also attacked the law as being contrary to the Four-

teenth Amendment of the Constitution, because it required attendance at a public school, though both the father and the son selected a private school, and because the law compelled vocational education as distinguished from professional education. He further argued that the law in its terms was unreasonable, because no provision was made for emergencies, and because the law discriminated in favor of organized industry, which could establish continuation schools on their own premises without interruption in the work, as against other individual employers who are not so favorably situated.

The State of New York defended on the ground that the education law of New York was a proper exercise of the police power. The State, however, had no opportunity to demonstrate its point of view in the hearings held in the case, for the court stopped the appellant's counsel in the midst of his argument and then dismissed the case for lack of a substantial federal question.

Of the cases which were not reviewed by the Court one involved the question of criminal jurisdiction over offenses committed on a federal reservation, which has already been discussed.[12] Six cases involved prosecution for homicide. In one case a physician was prosecuted for having performed an unlawful operation on a woman, which resulted in her death.[13] There was a case of embezzlement in which the accused complained that the trial court

[12] See p. 183, supra.

[13] No. 280—*Shellenbarger v. Ohio.* October 15, 1928.

erred in amending the bill of exceptions after the case had gone to the appellate court.[14] In a case charging a defendant with misapplication of the funds of a bank, he attacked the constitutionality of the statute of Oregon which provides that facts found by a jury may not be reexamined by the court, if the verdict is supported by evidence.[15] In a prosecution under the prohibition law of the State of Washington, the appellant maintained that the court erred in refusing to instruct the jury that the defendant should be acquitted, if they believed that the liquor in question was not going to be sold in the State.[16] In another case which came under the prohibition law of the same State, the defendant petitioned the Supreme Court to pass on the constitutionality of the law, in so far as it exempted from its operation such persons as preachers, priests and rabbis. He maintained that such exemptions denied him the equal protection of law.[17] In one case a sailor who enlisted in the National Guard in Minnesota was prosecuted for violation of the Articles of War, because he did not attend the drills of the National Guard, and it was held that his enlistment in the naval forces of the United States was no excuse.[18] The remaining three cases, prosecutions for

[14] No. 550—*Kelsey v. Ohio.* The case was withdrawn before the Court took any action.

[15] No. 572—*Burke v. Oregon.* March 5, 1929.

[16] No. 721—*Bocher v. Washington.* May 13, 1929.

[17] No. 523—*Otto Kindlund v. Washington.* Dec. 3, 1928.

[18] No. 398—*Klingle v. Minnesota.* Oct. 22, 1928.

forgery,[19] violation of game laws [20] and the disbarment of an attorney,[21] did not present questions which merited consideration.

Of the six cases of homicide, two presented serious constitutional questions. In one of these cases a negro in Florida was convicted of murder and was sentenced to be hanged.[22] He complained that the practice in Florida to exclude negroes from jury duty was in violation of the amendments in the Constitution passed for the protection of negroes. This question, however, was raised too late in the proceedings, having been raised for the first time when the case was on appeal before the Supreme Court of the State. Shortly after the Supreme Court declined to review that case, a similar question came from Louisiana in a case, in which a woman was convicted of the murder of her husband.[23] She maintained that the practice in Louisiana to exclude women from jury duty was in violation of the Nineteenth Amendment to the Constitution. The Supreme Court of Louisiana held that the practice was not unconstitutional, and the Supreme Court of the United States declined to disturb that decision.

[19] No. 843—*Davidson v. California.* April 29, 1929.

[20] No. 822—*Urias v. Texas.* May 20, 1929.

[21] No. 435—*Schmutz v. Illinois ex rel Chicago Bar Association.* Oct. 15, 1928.

[22] No. 136—*Abe Washington v. Florida.* Oct. 8, 1928.

[23] No. 451—*Dreher v. Louisiana.* Oct. 29, 1928.

XII

CRIMINAL CASES

Federal Offenses

As has been indicated, in none of the sixty-eight federal criminal cases was the decision of the lower courts reversed. In the several cases in which hearings were held the judgments of the lower courts were affirmed and in one of these the judgment was affirmed in favor of the accused.[1]

Of the federal criminal cases disposed of by the Supreme Court during the past term, 39 involved questions pertaining to prohibition.[2] Only one of these cases was reviewed by the Court, and none involved matters of great public importance. On the other hand, they reflected problems in administration of criminal justice, which should be given serious consideration. The petitioners complained of arbitrary action on the part of the courts, of prejudicial remarks by the prosecuting attorneys, of misconduct by juries, and, outside the courts, there were several instances of unlawful action on the part of those who were charged with the duty of enforcing the law.

In the "wire-tapping" case,[3] the Supreme Court held, in the preceding year, that the tapping of tele-

[1] No. 305—*United States v. Fruit Growers Express Co.* May 13, 1929.

[2] For all the cases on prohibition see *U. S. Supreme Court Service*, October term, 1928—Subject Index, p. XLIII.

[3] *Olmstead v. United States*, 277 U. S. 438.

phone wires by prohibition agents did not constitute an unreasonable search and seizure contrary to the Fourth Amendment, and that therefore evidence so obtained was not inadmissible under the Fifth Amendment of the Constitution. This year there was a sequel to the wire-tapping case growing out of the same state of facts.[4] Here the defendants claimed they were entrapped by the Government agents who invited them to enter into the conspiracy to violate the National Prohibition Act. Counsel for the defendants attempted to cross examine the prohibition agent, and asked him under what name he registered at a hotel, supposedly in connection with this conspiracy. The prosecution objected to the question, and this objection was sustained. Counsel then attempted to ask the same question in another manner. The Court fined him $50.00 for contempt and rebuked him in the presence of the jury for "disorderly and obstructive conduct". Incidentally, the question whether this constituted improper conduct on part of counsel afterwards went to the Circuit Court of Appeals, which held that the attorney was not only within his rights, but that it was his duty, as counsel for the defendants, to ask that question.[5]

Arbitrary and prejudicial conduct on the part of the court, in the presence of the jury, was alleged by a number of defendants, claiming that, because of the court's misconduct, they were deprived of a fair and impartial trial by jury as guaranteed by

[4] No. 641—*Boyd v. United States.* Feb. 25, 1929.

[5] *Hugh Caldwell v. United States* (28 F (2) 684).

the Constitution. An example of this alleged abuse was a case in which the trial court excluded evidence as to the occupation of a prohibition agent before he entered the Government service.[6] The defense tried to establish that the agent was once an accomplice in the conspiracy charged, and that therefore his testimony should be subjected to close scrutiny by the jury. In this attempt, the court rebuked counsel in the presence of the jury, and refused to charge the jury on the weight of the evidence, as requested. This, the defendant alleged, was prejudicial conduct requiring a reversal of the decision.

In one case, the defendant charged that remarks made by the prosecuting attorney, in addressing the jury, were prejudicial and that the lower court erred in refusing to grant a new trial.[7] In his closing remarks to the jury, a prosecuting attorney stressed the fact that the defendants had not taken the stand in their own behalf. This was objected to by the defendants, but the objection was overruled.[8]

In two cases this year, defendants charged misconduct of juries. In one, it was contended that the jurors had read a newspaper account of the prosecution while acting as jurors in the case.[9] A motion for a new trial was denied on the ground that the objection was taken too late. In the second,[10] after

6 No. 517—*Sawyear v. United States.* Dec. 10, 1928.

7 No. 522—*Mike Vendetti v. United States.* Dec. 3, 1928.

8 No. 544—*George Kearns et al. v. United States.* Jan. 7, 1929.

9 No. 240—*Albert Marco et al. v. United States.* Oct. 15, 1928.

10 No. 271—*Max Gordon v. United States.* Oct. 15, 1928.

the verdict was rendered and the jury discharged, it was discovered that one of the jurors had on a previous occasion been foreman of a jury in a case against one of the defendants, and upon investigation it was learned that the juror had made reference to the previous case in the jury room. The defendant argued, in the Supreme Court, that the trial court should have granted his motion for a new trial on the ground of misconduct.

Unreasonable Searches and Seizures

After all the evidence is introduced, it is too late to object to it on the ground that it was obtained through an unlawful search and seizure. This was the ruling of the Supreme Court in the preceding term (1927-28).[11] During the past term, a case came to the Court, in which the Circuit Court of Appeals sustained the District Court in refusing to set aside evidence on the ground that the defendant had not filed a motion for a return of the liquor and to suppress the evidence, before the evidence was introduced. The Supreme Court declined to review that case.[12] On the other hand, where a defendant did make a motion for the suppression of the evidence and for the return of the property seized, and that motion was denied, the Supreme Court held that an appeal may not be taken from this ruling of the District Court, because the ruling was not a final one; the case must nevertheless proceed to trial.[13]

[11] *Segurola v. United States*, 275 U. S. 106.

[12] No. 823—*William Day v. United States.* May 20, 1929.

[13] No. 89—*J. Robert Cogen v. United States.* Jan. 2, 1929.

In the preceding year (1927-8) the Court held that where state troopers (in New York) obtain evidence through an unreasonable search and seizure, solely for the purpose of aiding the federal prosecution, the evidence so obtained is not admissible in the Federal courts.[14] A sequel to the "State Troopers" case came to the Supreme Court this year (1928-9).[15] The difference between the former case and the one which came to the Court this year, lay in the fact that in the latter, the troopers claimed they stopped the defendant because he disobeyed a traffic signal, and that having stopped him, they discovered the liquor in his car. The Government argued that the search and seizure was merely an incident to the lawful arrest; also that the search and seizure was not unlawful, because the violation of law was then committed in the presence of the officers. The defendant denied these facts.

The District Court permitted this evidence to go to the jury and the Circuit Court of Appeals, in commenting on this evidence said:

> "We must confess to considerable doubt whether, had the matter been before us in the first instance, we should have come to the same conclusion. The circumstances made the troopers' story somewhat doubtful and an easy compliance in any plausible tale may deprive defendants of their constitutional rights. This caution we are not, however, ourselves in a position to exercise, be-

[14] *Gambino and Lima v. United States*, 275 U. S. 310.

[15] No. 710—*William G. Marsh v. United States.* April 15, 1929.

cause, except in plain cases, we cannot tell from the cold record where the truth lies. For the future we take this occasion to press upon the District Judges that they search the testimony in such cases with care, remembering that the protection of defendants must in most cases rest finally with them."

It is strange that this constitutional guarantee of personal liberty "that the rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures", should depend on the skill of the trial lawyer in raising his objection at one moment or another, or should depend on such an accident (assuming the evidence to be true) as the disobedience of a traffic signal.

On the other hand, it is equally strange that evidence obtained through an unlawful search and seizure contrary to the Fourth Amendment, should not be admissible, because of the provision in the Fifth Amendment, that no person shall be compelled to be a witness against himself in a criminal case. It is not at all evident that a person is compelled to testify against himself merely because the search is unreasonable. In the "State Troopers Case", the defendants would, as a matter of fact, have been subjected to no lesser compulsion had there been a search warrant or probable cause. And so in the "Wire Tapping Case", whether the defendants were or were not compelled to testify against themselves is a question wholly independent of whether the search and seizure of the evidence was unreasonable.

Assuming, however, that an unreasonable search and seizure carries the implication that the defendants are compelled to incriminate themselves, the evidence in these cases should nevertheless have been admitted. It is clear that in all these cases the defendants were guilty, and there would have been no miscarriage of justice had the evidence been held admissible in the State Troopers Case, as it was held admissible in the Wire Tapping Case. What better evidence could be had, in proving unlawful possession and transportation of liquor than the liquor itself found in the automobile transporting it? What better evidence of a conspiracy could be adduced than a stenographic record of the conspiracy itself?

In fairness to the accused, juries should be instructed to scrutinize carefully evidence obtained through unlawful searches or through compulsion. But no useful purpose can be served by excluding such evidence. The Fourth and Fifth Amendments were not promulgated as a protection to the criminal, but as a source of security for the entire people. If the purpose is not the protection of the criminal, but the safeguarding of the fundamental rights of the people, then the criminals should bear the consequences of their acts, and at the same time protection should be given to the people against those zealous and well meaning, but unintelligent or unscrupulous, agents of the Government who invade those constitutional rights.

The Fourth and Fifth Amendments to the Constitution, as well as the Eighteenth Amendment, require enforcement. The prohibition agents who violated the law of the State of Washington by tapping private telephone wires should have been prosecuted under the state law. But that is not enough. The events of recent years have definitely proven that affirmative legislation is necessary for the protection of these constitutional rights. Federal officers violating the Fourth and Fifth Amendments should be subjected to punishment. Rights of action against such offending agents of the Government should be given to persons whose rights are invaded, even if the offenders are "quasi-judicial" officers. Expulsion from office, fine, imprisonment and liability in civil damages are penalties none too severe for violating the Fourth and Fifth Amendments. By such measures the Government's agents will be by far more effectively dissuaded from invading constitutional rights, than by excluding their testimony and incidentally benefiting a criminal at the expense of society.

Homicide

The free use of fire arms by prohibition agents has within recent years evoked considerable concern on the part of the public. Such a case came to the Supreme Court last term.[16] A prohibition agent was stationed at the Huron River to watch out for vessels carrying liquor. An innocent person, who hap-

[16] No. 247—*Benway v. People of State of Michigan.* Oct. 15, 1928.

pened to be an elderly rural mail carrier returning from a duck hunt in a motor boat, was ordered to stop. When he failed to obey, the prohibition agent shot and fatally wounded him.

The evidence in the case was conflicting. The companion of the victim testified that they did not hear the order to stop because of the noise of the motor boat. The prohibition agent testified that when he ordered the men to stop, he first fired in the air twice, and then one of them said: "I'm coming in and blow you out of the water." It was then that he shot and killed one of the occupants of the boat. The prohibition agent was first prosecuted in the state court, but the case was removed to the federal court, where he was found guilty of felonious assault. The prohibition agent brought his case to the Supreme Court arguing that when his command to stop was disobeyed, he fired merely in the reasonable performance of his duty as a federal agent, and that therefore he should not have been held liable. But the Supreme Court did not grant him a review.

Violence in connection with the enforcement of prohibition is not exclusively chargeable to the Government agents. In one case the Supreme Court was asked to review the decision of the Circuit Court of Appeals on the question whether a Revenue Cutter may stop a vessel of American registry and search it, outside the twelve mile limit.[17]

The defendant was charged with murder on the high seas. The facts as found by the courts below

[17] No. 935—*Alderman v. United States.* June 3, 1929.

were as follows: The defendant was operating a motor boat off the coast of Florida. About seventeen miles from the coast he was ordered to stop. There were six coast guards and a secret service operative on board the Coast Guard vessel. Upon search, it was found that the motor boat contained twenty cases of whiskey. During the search, the defendant drew two guns, shot one of the coast guards and lined up the others. He ordered his assistant to go on board the Revenue Cutter, let out the gas and blow it up. The assistant grew faint-hearted and found several reasons for disobeying the order. His final excuse was that he could find no matches. The defendant then attempted to get some matches for him, when the Government officers took advantage of the situation and rushed upon the defendant. In the fray that followed, the secret service man was shot and killed, but the defendant was overcome and brought to trial. For the double murder committed, he was sentenced to death.

He petitioned the Supreme Court to review the case, maintaining that the Revenue Cutter had no right to stop him outside the twelve mile limit, had no right to search him without a warrant, and that when the coast guards came on board the vessel, he shot and killed in self defense.

Whether a foreign vessel sighted within the twelve mile limit may be overtaken outside the twelve mile

limit, was a question raised in several cases.[18] The Circuit Court of Appeals held that once a vessel imports the liquor within the twelve mile limit, it may be pursued and taken outside the limit, and the Supreme Court did not go into those cases.

Majority of the Prohibition Cases Without Merit

Most of the cases, however, which came under the National Prohibition Act raised technical questions, having no bearing on the merits and not involving any important questions of general law; as for example, the sufficiency of the evidence to support the conviction; the sufficiency of the allegations in the indictment to constitute offenses against the United States, etc.

In one case, the defendant alleged a fatal variance between the place named in the indictment and the place of the offense proven at the trial;[19] in another, that the indictment was defective because it charged the defendants with conspiracy to manufacture, possess, etc., "special denatured alcohol * * * contrary to and otherwise than in accordance with the National Prohibition Act", but failed to state that the

[18] No. 397—*Gilliam v. United States.* Oct. 22, 1928. See also No. 329—*Auxiliary Schooner "Mistinguette" v. United States.* Oct. 22, 1928. No. 330—*416 cases G. T. Whiskey, etc. v. United States.* Oct. 22, 1928. No. 331—*63 Kegs of Malt, etc. v. United States.* Oct. 22, 1928.

[19] No. 542—*Day v. United States,* Dec. 10, 1928.

intoxicating liquors to which the conspiracy related were fit for beverage purposes, or were intended to be used for beverage purposes.[20] In another case, the defendants were charged with conspiracy to violate the law through the sale of intoxicating liquors, but the indictment failed to state that the liquors were intended to be used for beverage purposes.[21] The defendants objected to the indictment, but their objection was overruled because it came too late. They had raised the objection after the case had gone to the jury and after a verdict of guilty had been brought in.

Using Mails to Defraud

The next largest class of federal criminal cases involved the use of mails to defraud. Here there were a number of cases which aptly illustrate the frivolousness of the questions often brought to the court in connection with criminal prosecutions. In one of these cases[22] the defendant maintained that he should not have been convicted, because the indictment stated that the defrauding letters were "deposited *or* caused to be deposited", by him instead of stating that they were "deposited *and* caused to be deposited". Evidently he expected the Supreme Court to reverse the decision of the District Court and the Circuit Court of Appeals who

[20] No. 821—*Elsinore Perfume Co., Inc. v. Campbell, etc.* June 3, 1929.

[21] No. 582—*Gibson v. United States.* May 20, 1929.

[22] No. 168—*Brady et al. v. United States.* Oct. 8, 1928.

held that the error, if any, was not fatal. In another case [23] the defendant maintained that he was erroneously convicted and sentenced, because the defrauding letter was sent out by a corporation of which he was a principal officer, and not by the defendant himself. In still another case,[24] the defendant maintained that a letter sent by him to his victims after they had purchased and paid for certain shares of stock, which constituted the scheme to defraud, could not be said to have been sent for the purpose of executing his scheme.

The Harrison Narcotic Act likewise figured in several cases of no merit, but toward the end of the term an interesting question of constitutional law was brought before the court in connection with a prosecution under the Narcotic Act.[25] The defendant, after having been convicted of selling morphine was prosecuted and convicted for shipping and delivering the same morphine in interstate commerce. This, he claimed, was subjecting him to double jeopardy. The Supreme Court granted his petition to review the decision of the Circuit Court of Appeals, and the case will be argued during the coming term.[26]

The provision in the Sixth Amendment of the Constitution that "in all criminal prosecutions the ac-

[23] No. 191—*Barnes v. United States.* Oct. 8, 1928.

[24] No. 298—*Brady v. United States.* Oct. 15, 1928.

[25] No. 850—*King v. United States.*

[26] While the book was in press the Supreme Court affirmed the decision of the Circuit Court of Appeals in this case. No. 70 (October term, 1929), *Fred I. King v. United States.* Oct. 28, 1929.

cused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed'' came to the Supreme Court in connection with a prosecution for the violation of the Federal Reserve Act.[27] In this case officers of a national bank made false entries in the books. The offense was committed in Tulsa, Oklahoma, in 1923, when the City was in the Eastern District of Oklahoma. Later, Congress created a new Northern District in Oklahoma, and Tulsa became a part of this new district. The indictment, however, was returned in the Eastern district, where the officers of the bank were tried and convicted. The question was whether the above requirement of the Sixth Amendment had been complied with. The Supreme Court interpreted the Act of Congress creating the new Northern District as leaving the offenses theretofore committed to be tried in the old Eastern District.

The remaining cases presented a large variety. There were cases involving the prosecution for exporting arms to China,[28] in which it was maintained that Congress had no constitutional right to delegate to the President the power to determine to which of the foreign countries arms and ammunition may not be exported. There was a prosecution for the unlawful importation of an alien,[29] and several cases in which deportations of aliens were ordered

[27] No. 182—*Allie E. Lewis v. United States.* March 5, 1929.

[28] No. 185—*Lee et al. v. United States.* Oct. 8, 1928.

[29] No. 319—*Geo. M. Emanuel v. United States.* Nov. 19, 1928.

because they had committed crimes within the first five year period of residence in the United States.[30] Questions of sufficiency of indictment or sufficiency of evidence to sustain convictions were brought up in connection with cases involving the bribery of government officers,[31] perjury,[32] concealment of assets of bankrupts,[33] the violation of the Motor Vehicle Theft Act,[34] and the making of false tax returns.[35]

Contempt Cases

The criminal cases which aroused the greatest amount of public interest, however, were three contempt cases, two of which charged contempt of court, while one involved the contempt of the United States Senate.

At a public meeting a labor organizer denounced the injunction issued against the United Mine Workers of America and in no uncertain language advocated disobedience to the injunction. For this he was sentenced to forty-five days in jail. The judgment of the court was affirmed by the Circuit Court of Appeals, and the defendant petitioned the Su-

[30] No. 416—*United States ex rel. Niels P. Claussen v. Day.* May 13, 1929. No. 819—*Arthur G. Hurst v. Nagle.* May 13, 1929.

[31] No. 134—*John Henderson v. United States.* Oct. 8, 1929. No. 379—*Daniel J. Shields v. United States.* Oct. 22, 1928.

[32] No. 866—*Sol Jacobs v. United States.* May 27, 1929.

[33] No. 883—*Samuel L. White v. United States.* June 3, 1929.

[34] No. 437—*W. H. Bough v. United States.* Oct. 22, 1928.

[35] No. 899—*Morris Lisansky et al. v. United States.* June 3, 1929.

preme Court for a review, maintaining that the injunction was contrary to the Clayton Act.[36]

In the second case, Harry F. Sinclair, Henry Mason Day, Sherman W. Burns and William J. Burns were prosecuted for contempt of court, because they instituted an elaborate system of espionage on the jury in the case in which Sinclair was tried for conspiracy to defraud the United States. The defense was that no offense had been committed, because none of the jurors had been approached nor was it the intention of the defendants that the jurors be approached. Furthermore, they maintained that jury-shadowing was not contempt of court, but was a common practice of the Department of Justice itself. The trial court, however, excluded the evidence concerning the practice of the Department of Justice, and held that jury shadowing was an interference with the courts of justice, so near the presence of the court, as to make the defendants liable for contempt without a trial by jury. This was affirmed by the Supreme Court.[37] It held that the mere suspicion on the part of a juror that he, his family and friends were being subjected to surveillance, was enough to interfere with his exercise of sound judgment necessary for his consideration of the case. To the argument that the lower court erred in excluding evidence purporting to show such a practice upon the part of the Department of Justice, the Su-

[36] No. 669—*Anthony Minerich v. United States.* March 11, 1929.

[37] No. 748—*Harry F. Sinclair et al. v. United States.* June 3, 1929.

preme Court held that the mistakes or violations of law by the Department gave no license for wrongful conduct to others. As to William J. Burns, however, the decision of the Supreme Court of the District of Columbia was reversed on the ground that there was no evidence to show his connection with the plan of espionage.

Harry F. Sinclair was also held guilty of contempt of the United States Senate when he refused to testify concerning his connection with the Teapot Dome leases and his relations with Secretary Fall.[38] His refusal to testify was based on a number of grounds, among which was that the Senate Committee on Public Lands was prying into his private affairs, and that the Committee had no jurisdiction to ask him questions which at the time were pertinent to a case against the Mammoth Oil Company, then pending before the courts. The Supreme Court did not adopt the view that the inquiries related to his mere private affairs, and also held that the Senate's jurisdiction to investigate, as to matters within the scope of its authority, was not taken away by the pendency of the issues before the courts.

[38] No. 555—*Harry F. Sinclair v. United States.* April 8, 1929.

XIII

POLITICAL ISSUES

Federal Questions

The power of the President to defeat legislation by failing to return a bill after it has passed both Houses of Congress was questioned in the Pocket Veto Case.[1] This controversy arose when the Okanogan and other Indian tribes filed suit in the Court of Claims, claiming relief under an Act of Congress. The Court of Claims dismissed their case, holding that the Act never became a law. The bill proposing to give relief to the Indians was passed by both Houses of Congress, and was presented to the President for his signature on June 24, 1926. Eight days later the first session of the Sixty-ninth Congress adjourned for the summer recess. The President did not sign the bill, nor did he return it with his objections to the House in which the bill originated. The Indians then brought the case to the Supreme Court for review.

This case became especially important, because the Muscle Shoals Resolution,[2] which was passed by both Houses of Congress during the first session of the Seventieth Congress, met the same fate. It was presented to President Coolidge for his signature, but within less than ten days the first session of the

[1] No. 565—*Okanogan, etc., Indian Tribes v. United States*, May 27, 1929.

[2] Sen. Res. 46; 70th Congress, First Session.

Congress ended, and the President never did return the bill to Congress with his objections.

The question arose whether that bill likewise failed to become a law. President Coolidge took the position that by failing to return the bill he had vetoed it. Senator Norris, the sponsor of the Muscle Shoals Resolution, and other members of Congress, were of the opinion that the bill did become a law in accordance with the provision of the Constitution relating to the executive veto. The Constitution provides that if a bill is not returned by the President within ten days, Sundays excepted, it shall be a law in the same manner as if he signed it, "unless Congress by their adjournment prevent its return, in which case it shall not be a law."

The question with reference to the Muscle Shoals Resolution was therefore dependent on the issue in the case brought by the Okanogan Indians. The Judiciary Committee of the House of Representatives intervened in the case on behalf of Congress. It argued that the word "adjournment" in the above provision of the Constitution meant only the final adjournment of the Congress, but did not mean any adjournment for vacation, such as an adjournment of a session of Congress during which the measure was passed. The Committee argued that there was nothing to prevent the President from returning the bill to the officers of the House in which the bill originated within the ten days prescribed in the Constitution. The Committee further stressed that the ex-

ecutive veto is not an absolute veto, but is limited by the requirement in the Constitution that the President return the bill with his objections, and that since his power is limited, it should not be so interpreted as to mean that he may, without assigning reasons and without returning the bill to the Congress, veto the measure, except where the Congress ends and makes the return of the bill impossible. It was further argued that the provision, that the President must return the bill within ten days, Sundays excepted, was intended to mean ten legislative days, and that the President therefore could have returned the bill after Congress re-convened and within the ten legislative days from the time the bill was presented to him.

The Government, opposing the claim of the Indians, argued that the bill did not become a law, that the provision concerning ten days meant ten calendar days, with Sundays excepted, and that the word "adjournment" meant any adjournment within the ten calendar days.

The Supreme Court sustained the contentions of the Government, holding that the word "adjournment" in the Constitution included any adjournment within the ten calendar days, which prevented the President from returning the bill with his objections to the House in which it originated—to the House itself, and not to any officer or agent of the House.

Powers of the Senate

From a consideration of the powers of the Executive, we pass to the powers of Congress. The inquisitorial powers of the Senate were treated in two important cases. Harry F. Sinclair was held guilty of contempt of the Senate when he refused to testify concerning certain contracts he had entered into in connection with Teapot Dome and also concerning his relations with Secretary Fall.[3] He was asked to inform the Committee (1) about a contract between himself and a Mr. Bonfils concerning Teapot Dome; (2) concerning an agreement between himself, Secretary Fall and a Mr. Shaffer under which Mr. Shaffer was to receive a lease upon a certain portion of the Teapot Dome; (3) where and when he had met Secretary Fall during November and December of 1923; and (4) whether he or any of his companies had made any loans or gifts to Secretary Fall.

These questions Sinclair refused to answer, and he was prosecuted in the Supreme Court of the District of Columbia for contempt of the United States Senate. Here, Sinclair maintained, as he did before the Committee, as follows: (1) that the questions were not relevant to the subject matter of the investigations authorized by the Senate; (2) that the Senate could not require him to disclose his private affairs; (3) that the Senate could not require informa-

[3] No. 555—*Harry F. Sinclair v. United States*, April 8, 1929.

tion on matters in which the Government can have relief or redress only through judicial proceedings; (4) that he, Sinclair, had already been made defendant in a case involving the same subject matter and that he was therefore justified in refusing to answer questions pending in the courts.

Upon testimony taken, the trial court submitted to the jury the questions whether Sinclair had been interrogated on the above matters by the Committee and whether he had refused to answer those questions. The jury returned a verdict of guilty and Sinclair was sentenced.

After an appeal to the Court of Appeals of the District of Columbia, that court certified the issues of law to the Supreme Court of the United States, and then the Supreme Court directed that the entire record in the case be certified to it.

Sinclair's main contentions before the Supreme Court were (1) that the questions propounded by the Committee constituted an unreasonable search and seizure, contrary to the Fourth Amendment, (2) that the Senate had no power to require testimony relating to a witness's private business; (3) that the matters concerning which the Committee required information were already in the courts, and that therefore the Senate lacked jurisdiction over the subject matter and (4) that the questions of the pertinency of the interrogations was one of fact, and should have been submitted to the jury.

The Government argued that the power of the Senate to investigate and require witnesses to answer questions propounded had been settled in the Mal Daugherty case;[4] that since the questions propounded related to the administration of public lands, the matter was within the province of the Senate Committee's investigation; that the mere fact that a case involving the same subject matter was pending before the courts or that the Government might institute proceedings before the courts, does not deprive a Committee of Congress from investigating matters within their legislative fields. In this connection, the Government argued, that as a matter of fact, Sinclair was not a defendant in the case, as was presumed in the questions certified by the Court of Appeals of the District of Columbia, but that the suit in the courts was against the Mammoth Oil Company, a corporation, and not against Sinclair as an individual.

The Supreme Court held that the questions propounded by the Committee did not relate to Sinclair's mere private affairs, and also that the Senate's jurisdiction to investigate as to matters within the scope of its authority was not taken away by the pendency of a case before the courts. For this contempt of the Senate, Sinclair served a sentence of three months in the jail of the District of Columbia.

Another case involving the powers of the Senate grew out of the Pennsylvania senatorial elections

[4] *McGrain v. Daugherty*, 273 U. S. 135.

of 1926.[5] Thomas J. Cunningham was subpoenaed to appear before the Special Committee of the Senate investigating expenditures in the Pennsylvania Senatorial primary elections of 1926. After a number of questions, Cunningham was asked whether he had contributed any money toward the elections, to which he replied that he gave a total of $50,000 to Thomas F. Watson. The Committee then, in various ways, tried to obtain information from him as to how or where he obtained money and where he had kept it before he gave it to Watson. These questions Cunningham refused to answer on the ground that they were his personal affairs and that he was privileged from disclosing such matters to the general public. He was also asked whether he had reported these amounts in his federal and state tax returns. This question he also refused to answer.

Cunningham was given an opportunity at a later date to answer these questions and was threatened with proceedings for contempt. Still he refused to disclose his private affairs. The Special Committee then reported this matter to the Senate, and a warrant was issued directing the Sergeant-at-Arms to arrest him and bring him before the bar of the Senate to answer such questions as the Senate, through its Committee, may propound, and to keep Cunningham in custody to await the further order of the Senate.

[5] No. 647—*David S. Barry, etc., et al. v. U. S. ex rel. Cunningham*, May 27, 1929.

The Sergeant-at-Arms served the warrant on Cunningham, and the latter immediately sued out a writ of habeas corpus in the United States District Court in Philadelphia. He argued that the Senate had no power to ask these questions, because they were not pertinent to the purposes of the investigation, and were not in aid of any future legislation, and that the warrant of attachment, to cause him to come and appear, was invalid because he had already been subpoenaed by the Senate, and had responded to that subpoena.

The District Court held that the Senate Committee had the power to propound the questions and that the Senate had the power to bring Cunningham before it and direct him to answer further questions. The Court ordered Cunningham to be remanded to the custody of the Sergeant-at-Arms.

On appeal, the Circuit Court of Appeals for the Third Circuit reversed this decision of the District Court. The Court held, that since Cunningham had already appeared and testified, his refusal to answer the specific questions was the sole ground for his arrest, and that the warrant of arrest was not merely a subpoena to appear and testify but an arrest for contempt after he had already testified. The Court further held that for the warrant of attachment to be valid, it was necessary that the witness be first called, and that he refuse to appear.

The Government then brought the case to the Supreme Court. It argued that the power of the Sen-

ate to issue a warrant of attachment to bring a witness before it and to direct him to answer questions was established by the Mal Daugherty decision;[6] that the Circuit Court of Appeals was wrong in limiting that decision to cases in which the witness refused to appear altogether, and in holding that the Daugherty decision does not apply to witnesses who appear before the Committee, but refuse to testify.

This decision was overruled by the Supreme Court, which held that the writ of attachment was valid. Incidentally, the Court declared that it will not go into the relevancy of questions propounded, but will allow the same presumption of regularity to the proceedings of the Senate, when acting within the scope of its authority, as it gives to proceedings before the courts of law.

Said Justice Sutherland, in delivering the opinion of the Court:

> "If the Senate thought so, and, from the facts before it reasonably believing that this or other important evidence otherwise might be lost, issued its warrant of arrest, it is not for the Court to say that in doing so the Senate abused its discretion. The presumption in favor of regularity, which applies to the proceedings of courts, cannot be denied to the proceedings of the Houses of Congress, when acting upon matters within their constitutional authority."

[6] See Footnote (4), supra.

The identical question in the Cunningham case was involved in the case against Robert F. Stewart, in which the Supreme Court of the District of Columbia discharged the writ of habeas corpus and remanded Stewart to the custody of the Sergeant-at-Arms of the Senate. Stewart appealed his case to the Court of Appeals of the District of Columbia. While the case was pending there, the Senate passed a resolution, vacating the order of arrest, and the case was therefore dismissed in the Court of Appeals as having become moot.

Power of Courts to Punish for Contempt

During the trial of Sinclair for conspiracy to defraud the Government, Sinclair, Henry Mason Day and the Burns Detective Agency, instituted an elaborate system of shadowing the jury. The evidence showed that Sinclair and his assistant, Day, arranged with the Burns Detective Agency to have some fifteen operatives follow the jurors from the time they left the court room to the time they returned to court the following morning. These private detectives had been called to the District of Columbia from New York, Philadelphia and Baltimore. They were designated by certain numbers and letters. They submitted daily reports of the whereabouts of every juror, and of the character, financial standing, associations, church affiliations and other facts concerning a number of the jurors. After shadowing the jury for the first week of the trial,

the Burns Detective Agency concentrated upon jurors Kidwell, Kern and Glasscock. Seven of the detectives confined their attention to these three jurors.

Kidwell was the juror who figured prominently in the press as having said that he expected to get a car "a block long". In the reports by the Burns operatives he was described in the following terms: "As a boy he was pretty wild, drinking and running around with a rather tough crowd. He has quieted down a little now, but is still a sport." The detectives also tried to find out whether Kidwell and Kern were "really substantial citizens." One of the operatives went to Kidwell's house and under a pretense ascertained that Kidwell's brother (actually his father) was a barber at the Myrtle Hotel, which they designated in their reports as a "sporting house", and there attempted to engage the barber in conversation concerning the juror and the case.

Kern was under surveillance by a number of detectives who investigated his financial standing, made a report on the house he owned, the mortgages on the property, etc. Day directed that even Kern's brother be shadowed in order to ascertain how juror Kern could be riding around Washington in automobiles. In the reports, Kern was described as "quite a sport, will go to the races whenever he can, takes a drink and takes a chance on any kind of a bet."

Glasscock was shadowed by McMullin, who was employed by the Detective Agency under the name of Long. McMullin turned out to be "an enemy within the camp." He not only shadowed the juror, but made false reports to the detective agency, and then became the most prominent witness for the Government. He testified that Ruddy, the Burns man in charge of the jury shadowing, instructed McMullin to report falsely that Horace R. Lamb, Special Assistant to the Attorney General, had engaged juror Glasscock in conversation at the Potomac Flying Field. There was also testimony that Ruddy told McMullin that the Government had $100,000 to spend on the case and that "Sinclair was going to spend $200,000 on the case." While the espionage was going on, McMullin had conferred about the matter with former Governor Pinchot of Pennsylvania, and it was in consequence of that conversation that McMullin detailed the activities of the Burns Agency to the Special Counsel in the Sinclair-Fall conspiracy case.

Sinclair, Day, William J. Burns and W. Sherman Burns were then prosecuted for contempt of Court. They justified the jury shadowing on the ground that it had been the practice of the Department of Justice to shadow jurors in order to prevent tampering, and that the defendants in this case had a right to do the same, lest the jurors be tampered with by the prosecution. They maintained that so long as they

did not directly approach the jurors, or come into actual contact with them, or converse with them, they were not tampering with the jury, and that no offense was committed so near to the presence of the court as to give the court jurisdiction to adjudge the defendants guilty of contempt.

After a protracted trial in the contempt case, the Supreme Court of the District of Columbia found the defendants guilty of criminal contempt. Sinclair was sentenced to imprisonment in jail for six months; Day was sentenced to imprisoment for four months; William J. Burns was sentenced to serve for fifteen days and W. Sherman Burns was fined $1,000.

They appealed the case to the Court of Appeals of the District of Columbia, and that court certified the questions in the case to the Supreme Court of the United States. The Supreme Court then ordered the entire record in the criminal contempt case to be certified to it.

The Supreme Court upheld the judgment of the Supreme Court of the District of Columbia as to all the defendants, except William J. Burns.[7] As to him the judgment was reversed on the ground that there was no evidence to show his connection with the plan. In its decision the Supreme Court laid down the rule that jury shadowing constitutes contempt so near the presence of the court that the offender may be sentenced without trial by jury. To the defense that

[7] No. 748—*Harry F. Sinclair et al. v. United States*, June 3, 1929.

in the course of the jury shadowing defendants had not approached the jurors, the Court held that this was immaterial, for the mere suspicion on the part of a juror that he, his family and friends were being subjected to surveillance, would be enough to render impossible the exercise of calm judgment. Sinclair and his co-defendants also maintained that they had a right to shadow the jury, because it had been the practice of the Department of Justice to spy upon juries. The Court held that the lower court rightly excluded evidence purporting to show such practice on the part of the Department of Justice, because the mistakes or violations of law by the Department gave no license for wrongful conduct to the defendants.

Pacifist Denied Citizenship

A political question, reflecting in a sense our attitude toward world peace and the outlawry of war came up in connection with the naturalization of aliens. The Supreme Court held that a pacifist, who refuses to bear arms and would advocate that others do likewise, may not become a citizen of the United States, even though the applicant for naturalization be a woman and of an age which would render her ineligible for military service.[8] The decision was based on the proposition that it is the duty of all citizens to participate in the common defense against the enemies of the country, and that therefore, willingness to participate in the common defense is a

[8] No. 484—*United States v. Rosika Schwimmer*, May 27, 1929.

prerequisite for admission to citizenship. The opinion emphasized that common defense is not limited to the bearing of arms, but that the expression of ideas may aid or hinder the efforts of the country in the prosecution of a conflict requiring the bearing of arms.

Justice Holmes, in his dissenting opinion, took the view that adherence to pacifist views should not be a bar to citizenship any more than should adherence to any other view that might require amendment to the Constitution. He said:

> "Surely it cannot show lack of attachment to the principles of the Constitution that she thinks that it can be improved. I suppose that most intelligent people think that it might be. Her particular improvement, looking to the abolition of war, seems to me not materially different in its bearing on this case from a wish to establish cabinet government, as in England, or a single house, or one term of seven years for the President. To touch a more burning question, only a judge mad with partisanship would exclude because the applicant thought that the Eighteenth Amendment should be repealed."

And apropos to President Hoover's efforts to make the Kellogg Treaty effective, it is also apt to quote further from the opinion of Justice Holmes:

> "I would suggest that the Quakers have done their share to make the country what it is, that many citizens agree with the applicant's belief and

that I had not supposed hitherto that we regretted our inability to expel them because they believe more than some of us do in the teachings of the Sermon on the Mount."

Political Problems in the States

Political questions arising in the various states likewise came up for consideration by the Supreme Court. Two cases came from Illinois reflecting political conditions in that state. One of these challenged the right of the State Legislature to function, since it had failed to comply with the provision in the state constitution, requiring that the State be reapportioned every ten years.[9] A resident of Chicago filed suit in the Illinois courts to enjoin the state treasurer from paying any of the expenses connected with the General Assembly, scheduled to convene in January, 1929. His complaint was that since the state had not been reapportioned since 1901, in violation of the state constitution, the General Assembly was not lawfully constituted.

The Circuit Court in Cook County dismissed the complaint, and the citizen appealed to the Supreme Court of the state. That court agreed with the complainant's contention that the duty to reapportion the state every ten years was mandatory and continuing. The court ruled, however, that under the state constitution, the government was divided into three distinct departments—legislative, executive and judicial—and that the courts had no power,

[9] No. 767—*John B. Fergus v. Garrett Kinney*, April 15, 1929.

either directly or indirectly, to coerce the legislative department in the performance of duties which were clearly and exclusively within the scope of its legislative functions.

The citizen then petitioned the Supreme Court to review that decision. He maintained that the failure of the Legislature to reapportion the state deprived the citizens of a republican form of government guaranteed to the states by the Constitution of the United States and deprived them of the representative government guaranteed to Illinois under the Northwestern Ordinance of 1787. The Supreme Court, however, declined to go into the matter.

The second political controversy from Illinois concerned "politics" in the city of Chicago.[10] Here again it was maintained that the decision of the Supreme Court of Illinois deprived the people of a republican form of government. The case arose out of a contest growing out of the election of a judge for Cook County. The defeated candidate complained that the republican and democratic leaders caused the election of Judge Comerford through an unlawful conspiracy between them. The complaint stated that, contrary to the law of Illinois, Robert E. Crowe, the dictator of the Republican Party in the county, and George E. Brennan, dictator of the Democratic Party, had called together their followers; that these designated themselves as ward and precinct committeemen, but in fact,

[10] No. 649—*Andrew Donovan v. Frank D. Comerford*, March 5, 1929.

were never elected to such offices; that at the behest of the dictators they met at a hotel in Chicago, for the purpose of nominating their candidate; that at Crowe's dictation, Judge Comerford, a democrat, was selected as the republican nominee, and his name was certified to the County Clerk of Cook County, and that Brennan, at the same time and in the adjoining room of the same hotel, caused the same candidate to be nominated on the democratic ticket. Since the same candidate could not appear on more than one party ticket on the official ballot, Comerford remained the Democratic candidate until it was too late for any other candidate to get on the Democratic ticket, and then withdrew from that ticket, permitting his name to remain as the Republican candidate for the judicial office, without any opponent in the democratic column.

Andrew Donovan, a candidate for that office, protested against Comerford's name appearing on the official ballot. Of course, he was defeated; but he claimed that every vote cast for him was a legal vote, whereas every vote cast for Comerford was null and void, and that he was therefore the successful candidate in that election.

Donovan filed a petition contesting the election, but on a demurrer by the respondent, the Circuit Court of Cook County dismissed his complaint. He appealed to the Supreme Court of Illinois, maintaining that the election was contrary to the Ballot Act of the State and that the decision of the trial court

was in violation of the Federal Constitution guaranteeing a republican form of government in the states.

The Supreme Court of the state affirmed the decision of the lower court without passing on any of the legal or constitutional questions raised. Donovan petitioned the Supreme Court to review the decision, but the petition was denied.

A political controversy, reflecting mainly a racial problem, came from Oklahoma. It arose out of the general elections of 1926. A number of negroes complained that they were not given an opportunity to register as voters. The Federal District Court, where suit was brought to compel the state authorities to appoint a registrar, granted the relief sought by the negro voters. The decree, however, was issued one day later than the last registration day allowed by the state law. The negroes registered and voted, and their candidate for County Commissioner of Okfuskee County was elected.

The opposing candidate contested the election, claiming that the negro votes were void for late registration. The trial court held against the contestant, but its decision was reversed by the Supreme Court of Oklahoma, holding that the registration was late and therefore that the negroes' ballots were void.

The candidate who received the negro votes petitioned the Supreme Court to review the case, maintaining that the decision of the state court had failed

to give full faith and credit to the decree of the United States District Court. Here again it was maintained in opposition, that there was no federal question involved, because the Supreme Court of Oklahoma had merely interpreted and applied a local statute. The Supreme Court declined to grant a writ of review.[11]

Controversies Among States

Sitting as a court of original jurisdiction, the Supreme Court also considered a number of controversies among the sovereign states, of which the outstanding example was the Chicago Diversion Case.[12] Here the Supreme Court held that the Sanitary District of Chicago may not continue to divert water from Lake Michigan, to the injury of the commerce and navigation of the states bordering on the Great Lakes.

Twelve states participated in this controversy. The states bordering on the Great Lakes—New York, Pennsylvania, Ohio, Michigan and Wisconsin—complained that the withdrawal of over 8,500 cubic feet of water per second from Lake Michigan lowered the level of the Great Lakes and was causing damage to the commerce, navigation and other interests of the complaining states in the following particulars:

[11] No. 768—*Geren v. Cecil*, May 13, 1929.

[12] No. 7, Original; No. 11, Original, and No. 12, Original—*Wisconsin et al. v. Illinois and Sanitary District of Chicago*, Jan. 14, 1929.

(1) The hazards and dangers of navigation have been increased, (2) the carrying capacity of large lake vessels has been diminished, (3) the navigable capacity of four hundred harbors on the Lakes has been reduced, their value and utility having been damaged or entirely destroyed, (4) the damage to the navigation has indirectly affected the economic welfare and the economic structure of the states, especially the coal industry of Pennsylvania and Ohio and the iron ore mined in Minnesota, Wisconsin and Michigan, and shipped via the Lakes to New York, Pennsylvania and Ohio; likewise the grain and dairy products of Wisconsin and Minnesota, a source of food supply to Ohio, Pennsylvania and New York, (5) millions of dollars worth of docks have been damaged through decay due to the lowering of the water level, (6) large investments in beaches and summer resorts have depreciated, (7) many buildings having pile foundations have been weakened because the piles decayed and gave way, (8) private and municipal water supplies along the Lakes have been injured, and (9) parks, fish hatcheries, hunting and fishing grounds have been seriously affected.

The State of Illinois and the Sanitary District denied that the diversion injured the rights of the complaining states and, furthermore, set up a defense that the District was taking water from Lake Michigan under a permit issued by the Secretary of

War, under authority vested in him by the Rivers and Harbors Act.

The States of Missouri, Kentucky, Tennessee, Louisiana, Mississippi and Arkansas intervened as defendants in the case, claiming that the diversion resulted in raising the level of the Mississippi and aided navigation on that river.

The Supreme Court appointed Mr. Charles Evans Hughes as Special Master in the case. Shortly afterwards, Michigan filed its complaint alleging substantially the same injuries. Then New York followed with a similar complaint, and in addition to the above injuries alleged that the water power damage to New York has been estimated at over $100,000,000. These cases were consolidated with the main case.

After voluminous testimony had been taken, the Special Master submitted his findings of fact and conclusions of law. Mr. Hughes went fully into the history of Chicago's problem for the disposal of sewage. Originally, the Chicago River, the Little and Grand Calumet Rivers and the waters of their drainage basins flowed into Lake Michigan; while the Des Plaines River, rising in Wisconsin flowed southward and joined the Kankakee River to form the Illinois River which flowed into the Mississippi.

In 1822 Congress authorized the construction of the Illinois and Michigan Canal connecting the Illinois River with Lake Michigan. This canal was completed in 1848. During this time the Chicago

River had been receiving the sewage and waste of industrial plants of the rapidly growing city. The river became very offensive. Various attempts were made to lower the level of the canal and flow lake water into the Chicago River in sufficient quantities to keep it in good condition. Pumps were installed to draw water from the lakes into the river and the canal. This continued until 1886, when the lake level began and continued to fall, and by 1891 it was two feet lower than when the pumps were installed. In the meantime, the city continued to grow, and the nuisance along the canal was as bad as ever. The sanitation problem assumed gigantic dimensions.

About 1890 the State of Illinois created the Sanitary District of Chicago which now embraces an area of 438 square miles, including a total of fifty-four cities, and having a frontage of about thirty-four miles on Lake Michigan.

The Sanitary District constructed the Sanitary and Ship Canal, which, when completed in 1900, extended from the South Branch of the Chicago River to the Des Plaines River and was provided with gates and dams, so that the amount of water flowing into the channel could be regulated. Since that time the flow of the Chicago River has been reversed and made to flow away from Lake Michigan.

Through the works constructed by the Sanitary District, at a cost of about $200,000,000, all the sewage of the District was diverted from Lake Michi-

gan, but the amount of water abstracted from the Lake increased from 2,541 cubic feet per second in 1900, when the District was established, to 6,888 cubic feet per second in 1926. This water has been made to flow through the Drainage Canal into the Mississippi River and has been permanently lost to the Great Lakes-St. Lawrence System.

In 1890 Congress passed the Rivers and Harbors Act, which was amended by the Act of 1899. This Act made it unlawful to construct any bridge, dam, dike, etc., in any navigable water without the consent of Congress and without the approval of the plans by the Chief of Engineers and the Secretary of War. The Act also provided "that the creation of any obstruction, not affirmatively authorized by Congress, to the navigable capacity of any waters of the United States, is hereby prohibited"; it also prohibited the construction of any wharf, pier, etc., except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and further provided that "it shall not be lawful to * * * alter or modify the * * * capacity of any lake, harbor or chanel of any navigable water, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War. * * *"

Since the passage of the first Rivers and Harbors Act, all the works undertaken by the Sanitary District were done under permits of the Secretary of War. The permits were granted for short periods

and specified the amounts of water which the District could divert from Lake Michigan. When in 1913, the District diverted larger quantities of water than were permitted, the United States obtained an injunction against such excessive withdrawals.[13] But beginning with the first permit, and in all subsequent permits, it was apparent that the purpose was to permit only such withdrawals of water as would be necessary to facilitate navigation in the channel; that there was a hesitation on the part of the Secretary of War as to his power to permit the diversions, and that he issued the permits subject to further action by Congress.

In 1925 the Secretary of War issued the last permit for a period of five years, permitting the withdrawal of 8,500 cubic feet of water per second, upon the condition that by the end of that period the Sanitary District will have completed a plant to take care of sewage treatment by artificial processes, equivalent in amount to 1,200,000 population.

Together with the main sanitation problem, two other projects have developed. Since the water made to flow through the canal had a considerable velocity, Illinois saw the possibility of utilizing the flow to generate electric power. In 1903, the Legislature passed an act authorizing the extension of the channel and the construction of dams, water wheels and other works necessary to develop this power. This project was completed in 1907. During that year, the output of the power house was 21,000,000

[13] *Sanitary District v. United States*, 266 U. S. 405.

KWH, while the amount of the water flow was 6,643 cu. ft. per second of which 25.4% was thus used for power. The output of power steadily increased, until in 1926 it was over 118,000,000 KWH, the amount of the flow being 8,283 cu. ft. per second, of which 97.2% was used for power. It costs the Sanitary District $26.40 per horsepower, which it sells to the City of Chicago at cost, as well as to other municipalities, and also sells power commercially at $55 per horsepower.

In planning the construction of the Sanitary and Ship Canal, Illinois also entered upon a project to procure the construction of a waterway for navigation from the Great Lakes, via the Des Plaines and Illinois Rivers to the Mississippi. This project has not been developed, except in so far as the construction for sanitation purposes aided the project for navigation.

The Special Master found that the levels of the Great Lakes have been affected by the diversion, that the mean levels of Lake Michigan and Lake Huron have been lowered six inches and that the levels of Lake Erie and Lake Ontario and the levels of the connecting rivers, bays and harbors have been lowered five inches. He also found that although the amount of the damage caused to the complaining states by the lowering of the levels was not susceptible of exact computations, they "have established that the diversion through the Chicago

Drainage Canal has caused substantial damage to their navigation, commercial and other interests."

As to the question, whether the diversion has improved navigation on the Illinois and Mississippi Rivers, Mr. Hughes concluded that although the diversion has to some extent increased the depths over the bars on the Mississippi, the extent of this increase was not sufficiently evident to warrant a finding. He stated, however, that it was permissible for the Secretary of War to reach the conclusion that the diversion of 8,500 c. f. s. was to some extent an aid to navigation on the Mississippi in time of low water.

Upon these facts the Special Master concluded: (1) That the Sanitary District could not lawfully divert waters from Lake Michigan without authority from the United States. (2) That the rights of the states in navigable waters are subject to the paramount power of Congress to regulate interstate and foreign commerce, which includes the control over navigable waters. (3) That Congress has delegated this power and control to the Secretary of War. (4) That in pursuance of this authority he permitted the Sanitary District to divert waters from Lake Michigan. Whether the motive for the regulation was to aid navigation directly or indirectly, or whether the motive was sanitation rather than navigation, it does not alter the validity of the permit. (5) That therefore the diversion was law-

ful, and the petition of the complaining states should be dismissed.

The complaining states contended that the Sanitary District of Chicago and the state of Illinois have diverted the water unlawfully, because the same was done without the consent of Congress. They argued that Congress could not have consented to it, because any act authorizing the diversion would amount to a taking of private property without just compensation and would be in contravention to the provision in the Constitution that "no preference shall be given by any Regulation of Commerce to the ports of one State over those of another * * *."

The States also maintained that in granting the permit, the Secretary of War exceeded whatever authority he might have derived from the power of Congress over interstate and foreign commerce, because the lowering of the navigable capacity of the Lakes was not in aid of navigation, but for purposes wholly independent of any question of navigation, namely, for purposes of sanitation and development of power. In opposition to the conclusions reached by the Special Master, they maintained that the power to grant such a permit must be determined in terms of the purpose to be accomplished, otherwise the Secretary of War could destroy the sovereign and proprietary rights of the states, and take their public property for private use, under the

guise of the power of Congress to regulate and control navigable waters.

The complaining states further maintained that Congress never delegated such powers to the Secretary of War. The Rivers and Harbors Act of 1899 prohibited any structures which would alter the navigable capacity of waters without affirmative sanction by Congress, and Congress has never passed an act authorizing the diversion. As further evidence which would negative the intention of Congress to give the Secretary of War power to issue such permits, they maintained that Congress did not intend to permit the Secretary to encroach on the jurisdiction of the International Joint Commission. Under the Treaty of 1909 between the United States and Canada, this Commission was given power to pass on all questions of diversion of waters from the Great Lakes as affecting the two countries.

The states along the Mississippi, as intervening defendants, claimed that the Special Master had minimized the importance of the effect of the diversion on the Mississippi, and stressed the great importance of the diversion as an aid to navigation.

As to the questions of constitutional law raised by the complaining states, Illinois argued: (1) That Congress had the power to authorize the diversion in the exercise of its powers over navigable waters. (2) That the Secretary of War had acted in accord-

ance with the authority delegated to him by Congress. (3) That the permit and the diversion did not result in a taking of property without due process or just compensation, because the rights of the complaining states were subject to disposition by Congress. (4) That the permission to divert water from one watershed into another did not constitute a preference in favor of ports contrary to the Constitution, because the advantages derived by the ports from the diversions were only incidental to the entire lawful project.

Illinois and the Sanitary District further argued that the Secretary of War, not the Sanitary District, is now in control of the diversion; that although Congress has never expressly authorized the diversion, yet it must be deemed to have acquiesced in it, because it had fostered, aided and encouraged the creation of the canal and made use of its results, and because it has always protected the diversion from interference especially in the Treaty between the United States and Canada. They claimed that while the compelling motive of the District in constructing the Sanitary and Ship Canal was the disposal of the sewage, the State has had no other motive than the opening of a waterway to the Mississippi. Furthermore, that the use of the diversion for the development of power was only an incidental and harmless afterthought, which took advantage of, but did not influence, the diversion.

The State and the Sanitary District furthermore argued that the injunction sought against them would cause untold damage to them and to navigation and would subject the lives and health of the inhabitants of the Sanitary District to serious danger.

The Supreme Court overruled the recommendations of the Special Master, having found that, since, as a matter of fact, the diversion of the waters from Lake Michigan was not made for the purposes of navigation, but for purposes of sanitation, the Secretary of War had no power to authorize such diversion. The Court further interpreted the permit of the Secretary as allowing the Sanitary District to continue the diversion only for a reasonable time which might be required to construct means for the complete disposal of sewage by artificial processes. In other words, that the permit was given for the purpose of rendering the port of Chicago usable, rather than to permit a diversion which would constitute an obstacle to navigation.

A court of equity, however, will not issue a decree which would cause great hardships and subject a large population to dangers from unsanitary conditions. The Court, therefore, referred the case again to the Special Master for the purpose of arriving at a practical plan whereby the Sanitary District of Chicago may dispose of its sewage by artificial means.

It appears that this dispute is a forerunner of other controversies among the states on the question of diversion. Suits involving similar questions are now pending before the Supreme Court between the states of Colorado and Kansas,[14] Connecticut and Massachusetts,[15] and between New Jersey and New York.[16]

[14] No. 14, Original (October Term, 1929)—*Colorado v. Kansas.*

[15] No. 13, Original (October Term, 1929)—*Connecticut v. Massachusetts.*

[16] No. 17, Original (October Term, 1929)—*New Jersey v. New York State and City of New York.*

XIV

INTERNATIONAL AND RACE QUESTIONS

Our treaties with foreign nations were the subject of controversy in a number of cases considered by the Supreme Court during the term. The Jay Treaty was held to have been abrogated, and the Court interpreted liberally our treaties with Denmark and Japan. There were also a number of outstanding decisions arising out of our domestic racial problems, notably the negro question.

The Jay Treaty

At this late date, the Supreme Court decided that the Jay Treaty between the United States and Great Britain, entered into in 1794, had been abrogated by the War of 1812. The issues in the Canadian Border Crossing case depended on this question. The controversy arose when two Canadians crossed the border and came to Buffalo, one to work and the other to seek employment. They were arrested for not being in possession of unexpired immigration visas, contrary to the Immigration Act. The Canadians argued that they were not "immigrants", but visitors commuting to the United States daily on business, and that their right to free passage over the border had been long established by the Jay Treaty.

The Government argued that the Jay Treaty did not intend to include laborers commuting to the

United States, that the Treaty had been abrogated by the War of 1812, and that these Canadians were subject to the Immigration Laws whose definite policy is to protect American labor from foreign competition. In all these contentions, the Government was sustained by the Supreme Court.[1]

Treaty with Japan

The Alien Land Law of California, aimed against the ownership of land by Japanese, again came to the Supreme Court. In this case, the Court upheld the right of Japanese physicians to incorporate a hospital and to lease lands for such purposes. The controversy arose, when the Secretary of State of California refused to accept and file their certificate of incorporation. The Japanese brought suit in the California courts maintaining that the action of the Secretary was contrary to the Treaty of Commerce and Navigation between the United States and Japan. The Supreme Court of California upheld the contentions of the Japanese physicians, and the Supreme Court of the United States, in affirming the decision of the state court, adhered to the rule that the terms of a treaty must be liberally construed. It held that the organization of a corporation for the purpose of conducting a hospital was "commerce" within the meaning of the treaty, and that therefore the Alien Land Law

[1] No. 198—*Arthur J. Kurnuth, U. S. Director of Immigration et al. v. United States, on petition of Preston M. Albro, Attorney,* April 8, 1929.

could not operate to deprive the Japanese of that right.[2]

Treaty with Denmark

The Supreme Court also liberally interpreted our treaty with Denmark, and held that a state may not tax a non-resident Danish subject, heir to property left in the United States, at a greater rate than it taxed a resident American heir.[3]

Under the law of Iowa, an inheritance tax must be paid by residents or citizens on all inheritances above the first $15,000 of the net estate, but where the inheritance passes to a non-resident alien, no exemption is allowed and the whole net estate is taxed at a higher rate than one inherited by residents or citizens of the United States.

In this case, a resident of Iowa and a subject of Denmark died and left an estate of less than $15,000. The estate was left to a non-resident alien, and he claimed that the law was unconstitutional because it was contrary to the most favored nations clause in the treaty between United States and Denmark.

The Treasurer of Iowa argued that the provision in the state inheritance tax law did not violate the favored nations clause of the Treaty, because it taxed the "right" to inherit, rather than the prop-

[2] No. 13—*Frank C. Jordan et al. v. K. Tashiro, M. D., et al.*, Nov. 19, 1928.

[3] No. 115—*Jens C. Nielsen, Administrator, v. R. E. Johnson, Treasurer of the State of Iowa*, Feb. 18, 1929.

erty inherited. But the Supreme Court held the law constituted a discrimination forbidden by the treaty, and reversed the decision of the Iowa courts on that question.

Treaty with Italy

In a case which arose under the Workmen's Compensation Act of West Virginia, the validity of a clause in the law was attacked, as violating our treaty with Italy. An Italian coal miner was killed in an explosion in the state, and his administrator brought suit under the state law for the benefit of his dependent parents, residents of Italy. The Federal District Court in West Virginia sustained the contentions of the coal company, which defended on the ground that the Compensation Act excludes non-resident alien parents from recovering damages. This decision was affirmed by the Circuit Court of Appeals.

The administrator petitioned the Supreme Court to review the case, arguing that the decision of the lower courts constituted a violation of our Treaty with Italy which provides that "the citizens of each country shall receive in the state and territory of the other, the most constant security and protection for their person, and property and their rights." The Supreme Court, however, declined to review the case.[4]

[4] No. 638—*Vincenzo Madonna, Administrator, v. Wheeling Steel Corporation*, Feb. 25, 1929.

Treaty with China

A Chinese boy was excluded from the white public schools in Mississippi. His father filed a petition in the state courts for a writ of mandamus to compel the reinstatement of his son. He argued that the exclusion of the child was contrary to the equal protection clause of the Fourteenth Amendment, since the educational facilities of the colored schools in the State were not equal to those of the white schools, and furthermore that the exclusion violated our Treaty with China.

The trial court granted the writ, but its decision was reversed by the Supreme Court of Mississippi. The Chinese parent appealed to the Supreme Court of the United States. Before the matter came up for argument, however, the boy reached his majority, and the case was therefore dismissed as moot.[5] In a similar case during the preceding term, the Court, in an opinion by Chief Justice Taft, upheld the provision in the Mississippi Constitution requiring the establishment of separate schools for white and colored. But in that case, the Chinese child was a citizen of the United States, and the Treaty provisions were not involved.[6]

Exportation of Arms

Several Chinese were convicted of conspiracy to export arms from San Francisco to China, in violation of the Joint Resolution of Congress, passed

[5] No. 74—*Joe Tin Lun v. Bond*, March 11, 1929.

[6] *Gong Lum et al. v. Rice*, 275 U. S. 78.

January 31, 1922, and in violation of the President's proclamation of March 4, 1922, against the exportation of arms to countries where conditions of violence exist. The defendants petitioned the Supreme Court for a review, arguing that the Resolution, forbidding the exportation of arms, whenever the President finds conditions of violence to exist, is an unconstitutional delegation of legislative power to the President. But the Supreme Court refused to disturb the decision of the Circuit Court of Appeals.[7]

Several cases involving Chinese deportations came to the Supreme Court during the past term. Most of these concerned a question of fact, namely, whether the Chinese were citizens of the United States, or were the legally adopted sons of citizens of the United States. In only one of these cases did the Court grant a review, but this case was finally dismissed, because the petitioner had not complied with the rules of the Court in reference to the printing of the record.[8]

Law Against Ku Klux Klan

Two outstanding decisions favorably affecting negroes were rendered this term. In one of these the Court upheld the Walker Law of New York, which had been directed mainly against the activities of the Ku Klux Klan. This law required all or-

[7] No. 185—*K. C. Lee and Chew Fook Gum v. United States*, Oct. 8, 1928. See 42 Stat. 361.

[8] No. 203—*Chin Mon ex rel. Chin Yuen v. Anna C. M Tillinghast, Commissioner of Immigration*, Feb. 18, 1929.

ganizations, except labor unions and benevolent associations, to file statements with the Secretary of State concerning their membership, constitutions, by-laws, oaths, etc. A member of the local Ku Klux Klan organization at Buffalo was arrested, because he attended the meetings of the Klan, knowing that his organization had not complied with the provisions of the law. The New York courts upheld the Act.

In the Supreme Court, it was maintained that the law was contrary to the equal protection clause, because it exempted labor unions and benevolent associations; that it was contrary to the due process clause, because it limited the freedom of assembly; and that it deprived him of equal privileges and immunities in that it penalized him for belonging to secret organizations. All these contentions were overruled by the Supreme Court,[9] basing its conclusion on the distinction which the Court of Appeals of New York found to exist between organizations which make secrecy a cloak for acts and conduct inimical to personal rights and public welfare, and other secret organizations. In delivering the opinion of the Court, Mr. Justice Van Devanter adopted the following finding of the Court of Appeals:

> "It is a matter of common knowledge that this organization functions largely at night, its members disguised by hoods and gowns, and doing

[9] No. 2—*People of the State of New York ex rel. Bryant v. Charles Zimmerman et al.*, Nov. 19, 1928.

things calculated to strike terror into the minds of the people."

And continuing the discussion of the real distinction between an organization like the Ku Klux Klan and other secret organizations, the opinion stated:

"We assume that the legislature had before it such information as was readily available, including the published report of a hearing before a committee of the House of Representatives of the 57th Congress relating to the formation, purposes and activities of the Ku Klux Klan. If so it was advised—putting aside controverted evidence—that the order was a revival of the Ku Klux Klan of an earlier time with additional features borrowed from the Know-Nothing and the A. P. A. orders of other periods; that its membership was limited to native born, gentile, protestant whites; that in part of its constitution and creed it proclaimed the widest freedom for all and full adherence to the Constitution of the United States, in another exacted of its members an oath to shield and preserve 'white supremacy', and in still another declared any person actively opposing its principles to be 'a dangerous ingredient in the body politic of our country and an enemy to the weal of our national commonwealth'; that it was conducting a crusade against Catholics, Jews and negroes and stimulating hurtful, religious and race prejudices; that it was striving for political

power and assuming a sort of guardianship over the administration of local, state and national affairs; and that at times it was taking into its own hands the punishment of what some of its members conceived to be crimes.

"We think it plain that the action of the courts below in holding that there was a real and substantial basis for the distinction made between the two sets of associations or orders was right and should not be disturbed."

Another case which reflected problems of race prejudice was the case against the colored shriners. The Supreme Court of Texas had enjoined the Ancient Egyptian Arabic Order, Nobles of the Mystic Shrine from using the names, titles, emblems, regalia and paraphernalia of the white shriners, on the ground that the imitations were likely to mislead and confuse those who had dealings with the organizations.

The Supreme Court held that the injunction was erroneously issued, that as a matter of fact there was no evidence of deception or confusion, nor any evidence of intent to deceive, but that on the contrary, the colored shriners had at all times held themselves out to be a separate and distinct organization. The Court further found, that although the white shriners' organization had been organized in colonial times, the colored organization has existed since 1784, and that throughout its long life there had been no objection by the white shriners.

This long acquiescence, the Supreme Court held, barred the white shriners from now asserting an exclusive right to the names, emblems and regalia.[10]

In four cases, however, negroes were unsuccessful in their appeal to the highest court. In a case from Florida, a negro was convicted of murder and was sentenced to die. He petitioned for a review on the ground that negroes were excluded from the jury at his trial, and that despite the fact that negroes constituted one half the population of the county, no negro had been called for jury duty within the past fifteen years.

The state courts refused to grant a new trial, because this objection was raised too late in the proceedings, and the Supreme Court refused to disturb that decision.[11]

Two cases came from the District of Columbia, in which the courts of the District upheld the validity of leases containing restrictive clauses against the resale of real estate to negroes.

In one case, certain residential property in the District had been originally sold subject to a restrictive clause that the property should never be "rented, leased, sold, transferred or conveyed to any negro or colored person." The property was then sold to a negro, and several adjoining property owners brought suit to enjoin the negro from tak-

[10] No. 7—*Ancient Egyptian Arabic Order, Nobles of the Mystic Shrine, etc., et al., v. D. W. Michaux et al.*, June 3, 1929.

[11] No. 136—*Abe Washington v. State of Florida*, Oct. 8, 1928.

ing title or possession of the premises, in violation of the restrictions.

In the second case, property had been sold to about one hundred residents in the vicinity, who had entered into an agreement that for twenty-one years none of the properties should be used or occupied by, sold, conveyed, leased, rented or given to any negroes or any persons of negro blood or mixed negro blood. One of the residents later entered into an agreement to sell his property to colored persons. The adjoining owners brought suit to enjoin the negroes from holding title or possession.

The Supreme Court of the District of Columbia, in both cases, upheld the validity of the restrictive covenants, and this was affirmed by the Court of Appeals of the District of Columbia.

The colored purchasers petitioned the Supreme Court to review these decisions. They maintained that the agreements constituted an unlawful restraint on alienation of property and an unlawful restraint on trade, contrary to public policy; that the covenants were so contrary to the spirit of the Constitution, and so unreasonable and discriminatory that a court of equity cannot enforce them without doing violence to the fundamental conception of justice. Furthermore, they argued that the right to an injunction, restraining the negroes from acquiring the property, had been negatived by the fact that some of the deeds in question contained a provision, that if the property is rented, sold,

leased, transferred or conveyed to any negro, the seller must pay a penalty of $2,000, and that this penalty was intended to be a substitute for any injunctive right which the other purchasers of the property might have against the offending seller.

The complaining neighbors, on the other hand, argued in opposition that the cases did not involve a substantial constitutional question, that such restrictive covenants were not against public policy in the District of Columbia, but that, on the contrary, the public policy of the District permits and recognizes as necessary the segregation of negroes and white persons under certain conditions.

The Supreme Court declined to grant a review.[12] These questions were brought to the Supreme Court in a previous term in the case of *Corrigan* v. *Buckley*.[13] But that case was dismissed for lack of jurisdiction, and the Court did not pass on the merits of the contentions, because the appellants sought to bring their case on appeal, instead of by a preliminary application to review the decision of the Court of Appeals of the District of Columbia. The above cases this term, however, came properly to the Court, but no reason was assigned for the refusal to grant the writ of review.

Still another case, in which negroes lost their petition in the Supreme Court, came from Oklahoma.

[12] No. 867—*Henry A. Cornish et al. v. Patrick O'Donoghue*, June 3, 1929. No. 868—*Edward G. Russell et al. v. Frank S. Wallace*, June 3, 1929.

[13] *Corrigan v. Buckley*, 271 U. S. 323.

In the November, 1926, elections, some one hundred sixty-five negroes in Okfuskee County, Oklahoma, were not given an opportunity to register. After a mandatory injunction was obtained in the U. S. District Court in Oklahoma, the negroes registered and subsequently voted in the election. In a contest growing out of this election, the Supreme Court of Oklahoma held that the negroes in question had registered too late and that consequently their ballots were invalid. The negro contestant, who had won in the election, petitioned the Supreme Court to review the decision of the state court, arguing that the decision of the Supreme Court of the State was contrary to the provision in the Constitution that the right to vote shall not be denied on account of race, color or previous condition of servitude. The white contestant argued that the Supreme Court of Oklahoma had merely interpreted a local election law, and that therefore there was no federal question for the Supreme Court of the United States to consider. The Supreme Court did not grant the writ of review.[14]

[14] No. 768—*Geren v. Cecil*, May 13, 1929.

XV

THE JUDICIAL VETO

Laws of Congress

The question of limiting the power of the Supreme Court in declaring laws of Congress unconstitutional, has been the subject of serious discussion in recent years. A number of resolutions have been introduced in Congress from time to time, aiming to curb this power of the Court, and in 1924 the question culminated as an issue in the Presidential elections. The late Senator La Follette advocated a constitutional amendment whereby Congress could override the judicial veto in much the same way as it can override the executive veto. This, he believed, was necessary in order to preserve the liberties of the people. On the other hand, President Coolidge at about the same time publicly stated that the power of the Supreme Court to invalidate acts of Congress was the greatest safeguard of the liberties of the American people.[1]

Whichever view one takes, for a clear understanding of the problem, it is essential to know the laws which the Supreme Court declares valid, as well as those which are declared unconstitutional. But there is still a third class of cases in which the courts, because of their power to declare statutes unconstitutional, have so interpreted them as to

[1] Journal of the American Bar Association, October, 1922.

limit their operation.[2] An example of this class of cases came to the Supreme Court toward the end of the 1928 term and is still pending before the Court.[3] In this case, a candidate for Congress accepted campaign contributions from Federal employees, for which he was prosecuted. The District Court in Texas, where the action was brought, dismissed the case, because the contributions were made for the "primaries". The court held that the statute prohibiting the taking of contributions from Federal employees for any political purpose must be interpreted as meaning for *any federal purpose,* that "primaries" do not constitute a federal purpose, but a state matter, and that to hold otherwise might result in holding the Act unconstitutional, on the authority of the Newberry decision.[4]

The practice of courts to limit the operation of statutes, in order to avoid declaring them unconstitutional, appears as a corollary of the rule that courts will not declare a statute unconstitutional, unless it is obviously so, and that every presumption will be indulged in to arrive at the conclusion that the statute is not unconstitutional.[5] From the standpoint of those who favor the limitation of this

[2] Sometimes a law is so interpreted that its operation is extended rather than limited. See the *Railway Mail Pay Case,* infra.

[3] No. 66 (October Term, 1929)—*United States v. Harry M. Wurzbach.* (Case still pending).

[4] *Newberry v. United States,* 256 U. S. 232.

[5] Compare: *Harriman v. I. C. C.,* 211 U. S. 407, and *U. S. v. L. & N. Ry.,* 236 U. S. 318, with *Smith v. I. C. C.,* 245 U. S. 47.

power of the courts, the corollary is more dangerous than the power itself to declare laws unconstitutional. For, it may be argued, this practice involves not only the setting aside of the intent of Congress as expressed, but also the substitution of the judicial for the legislative intent. In other words, the practice of saving acts from being declared unconstitutional, borders on or involves the usurpation of the legislative function.

During the year under discussion, no laws of Congress were nullified by the Supreme Court, as compared with the previous (1927-28) term, when three federal laws were held repugnant to the Constitution.[6]

During the 1928 term, however, two laws were so interpreted as to avoid holding them invalid. One of these was the Railway Mail Pay Case, in which the Court held that the Interstate Commerce Commission was authorized to increase the rates for the carriage of mail and to make its orders retroactive to the time of the filing of the railroad's application for such increase.[7] Justice Holmes, delivering the opinion of the Court, held that since the railroads were required to carry mails, they were entitled to just compensation, and if their demand for an increased compensation was just, they should be

[6] *John W. Blodgett v. Charles Holden*, 275 U. S. 142; *National Life Insurance Co. v. United States*, 277 U. S. 508; *Peninsula Produce Exchange v. New York, Phila & Norfolk Railroad*, 276 U. S. 599.

[7] No. 238—*United States v. New York Central Railroad Co.*, March 11, 1929. See p. 34, supra.

paid the increase from the moment their application is filed. "Obviously, Congress intended the Commission to settle the whole business, and not to leave a straggling residuum to look out for itself, with possible danger to the validity of the Act."

The other case involved an interpretation of the McFadden Banking Act.[8] Specifically the question there presented was whether a state bank, which becomes consolidated with a national bank, may continue to act as executor of an estate, without qualifying under the Probate law of the State.

The Supreme Judicial Court of Massachusetts held that, if Sec. 3 of the McFadden Act permits such banks to act as executor without qualifying under the state law, this section must be declared unconstitutional, because such matters rest exclusively with the sovereign states. The Supreme Court affirmed the decision of the Massachusetts court, holding that Congress did not intend to contravene the laws of the state, in which the consolidating national banks or trust companies are situated, and that the concurrent compliance with both federal and state laws is necessary to give the consolidated bank the right to act as executor.

The Court upheld the validity of Sec. 316 of the Tariff Act of 1922 (42 Stat. 858) allowing appeals from the findings of the United States Tariff Commission to the United States Court of Customs Ap-

[8] No. 469—*Ex parte: Worcester County Nat'l. Bank of Worcester*, May 13, 1929. See p. 87, supra.

peals.[9] The controversy in this case began when the Bakelite Corporation filed a petition with the Tariff Commission, in which the corporation sought an embargo on the importation of all products made of synthetic phenolic resin, as an unfair method of competition and as injuring the business of such products in the United States.

The corporation declared that it had secured a patent on phenolic resin, which patent was about to expire, that it was supplying such products economically and efficiently, and that the imported products constituted an infringement of its patent which would injure or destroy the corporation's business.

The Tariff Commission instituted an investigation, and the importers appeared questioning the jurisdiction of the Commission in the case. Their contention was, that since the question of unfair competition depended on the validity of the Bakelite Corporation's patent, the Commission was without jurisdiction, because the determination of the validity of patents lies exclusively with the United States courts. The Tariff Commission in a divided opinion (Commissioner Costigan dissenting) held that it had jurisdiction and recommended to the President that an embargo be put on the importation of such products.

The importers then appealed to the United States Court of Customs Appeals. Here, the Bakelite Corporation maintained that in so far as the Tariff

[9] No. 17—Original—*Ex parte: Bakelite Corporation*, May 20, 1929. See p. 150, supra.

Act allows such appeal, that section is unconstitutional, because the proceedings did not present a "case or controversy" within the meaning of Sec. 2, Art. III of the Constitution, but involved merely a recommendation of the Commission to the President, upon which he may or may not act.

The Court of Customs Appeals held that it had jurisdiction, and this was affirmed by the Supreme Court. The Court held that the United States Court of Customs Appeals was a "legislative" court like the Court of Claims, the United States Court for China, the Consular courts, etc., as distinguished from "constitutional" courts, and that the constitutional provision as to "case or controversy" applies only to the constitutional courts.

The Court also upheld the provision of the wartime Lever Act (40 Stat. 276, 284) empowering the President to fix prices of food and fuel.[10] Under the authority of that Act, the President, in 1917, issued an Executive Order fixing the price of coal at two dollars per ton. About the same time a buyer agreed to purchase coal at $3.60 and more, and the coal was delivered pursuant to that agreement. The buyer then paid the price as fixed by the Executive Order and refused to pay the balance of the contract price. In a suit by the seller, the Pennsylvania courts held in favor of the buyer. The seller maintained that, as applied in this case, the Act violated his contract rights and was therefore contrary to

[10] No. 8—*Highland v. Russell Car & Snow Plow Co.*, April 8, 1929.

the due process clause of the Fifth Amendment. But the Supreme Court, affirming the decision of the Pennsylvania courts, held that the law was a proper measure in aid of national defense.

After reviewing the history of the pre-war and war-time legislation in aid of national defense, Justice Butler, who delivered the opinion of the Court, stressed the importance of protecting life, liberty and property, but held that these rights are not absolute and universal and that "Congress may regulate the making and performance of such contracts whenever reasonably necessary to effect any of the great purposes for which the national government was created." And with reference to this law as applied to the facts of the case, Justice Butler said:

> "The principal purpose of the Lever Act was to enable the President to provide food, fuel and other things necessary to prosecute the war without exposing the government to unreasonable exactions. The authorization of the President to prescribe prices and also to requisition mines and their output made it manifest that, if adequate supplies of coal at just prices could not be obtained by negotiation and price regulation, expropriation would follow. Plaintiff was free to keep his coal, but it would have been liable to seizure by the government. The fixing of just prices was calculated to serve the convenience of producers and dealers as well as of consumers of coal needed to carry on the war. As it does not appear that plaintiff would have been entitled to more if his

coal had been requisitioned, the Act and orders will be deemed to have deprived him only of the right and opportunity by negotiation to obtain more than his coal was worth. Such an exaction would have increased the cost of the snowplows and other railroad equipment being manufactured by the defendant and therefore would have been directly opposed to the interest of the government. As applied to the coal in question, the statute and executive orders were not so clearly unreasonable and arbitrary as to require them to be held repugnant to the due process clause of the Fifth Amendment."

The validity of two other acts of Congress was attacked during this term, but the Supreme Court refused to review the decisions of the lower courts. In one case the Court of Appeals of New York upheld the validity of the Longshoremen's and Harbor Workers' Compensation Act.[11] In the second case the validity of the Federal Estate Tax imposed by the Revenue Act of 1924 was questioned in so far as that law provided that the federal estate tax shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any state or territory or the District of Columbia in respect of any property included in the gross estate, provided that the credit shall not exceed 25

[11] No. 412—*Chernik v. Clyde Steamship Co.*, October 22, 1928. See p. 180, supra.

per cent of the tax imposed by the Federal Estate Tax.[12]

The Supreme Court did grant a review in a case questioning the constitutionality of the Federal Gift Tax of 1924. The case is still pending before the Court, and will be argued in the 1929 term.[13]

State Laws

No one seriously contends that the Supreme Court does not possess or should not possess the power to declare state statutes invalid when these are in conflict with the Federal Constitution or the laws of Congress. This power is derived from the express provision of Art. VI of the Constitution:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding."

Shortly after the formation of the Union there was serious controversy as to this power of the Federal judiciary.[14] That discussion was part of the general controversy concerning the subject of state

[12] No. 393—*Rouse v. United States*, October 22, 1928. See p. 105, supra.

[13] No. 27—(October Term, 1929)—*Bromley v. McCaugn.* No. 33 (October Term, 1929)—*O'Connor v. Anderson.*

[14] See *Hughes*, U. S. Supreme Court, pp. 82-84.

sovereignty. Within recent years, however, many state laws, invalidated by decisions of the Supreme Court, had an important economic or social significance, and those who disagreed with the Court's view on those economic and social theories, have transferred their dissatisfaction with the Court's rulings on the specific problems to the general power of the Court to hold state laws invalid.[15] For that matter, it may also be said that much of the opposition to the Court's power to declare Acts of Congress unconstitutional takes its source from the feeling on the part of these opponents that the Court is conservative and, adhering to older views on economic, political and other social problems, fails to give effect to more recent developments of those problems, as reflected in the Acts passed by Congress.

The question of the Judicial Veto should therefore be considered in the light of the social and economic developments in the country and to that end a discussion of the state laws, upheld or invalidated, is important. In this connection, the term "state laws" will include city ordinances and also such orders of state administrative bodies as are legislative in character.[16]

[15] See discussion on the N. J. Labor Act and Pennsylvania Tax on Corporations engaged in transportation, in *The New Republic*, June 20, 1928, pp. 110, 120.

[16] *John P. King Manufacturing Co. v. Augusta*, 277 U. S. 100; *Sultan Railway and Timber Co. v. Department of Labor and Industries, State of Washington*, 277 U. S. 135.

Over one hundred state statutes whose constitutionality was challenged were considered by the Supreme Court during the past term. These state laws may be roughly divided into three main classes, those coming under the police powers of the state, those concerned with the state's powers of eminent domain, and those coming under the state's powers of taxation. Among the first class of statutes were measures passed to promote health and safety, to conserve natural resources, to regulate trade and commerce, and measures passed for general public welfare.

This is a rough classification of the statutes included under the "police powers" of the states. The classes are not exclusive, but overlap, i.e., a safety measure may also be a measure regulating commerce, or a statute passed under the powers of eminent domain may have for its purpose the health and safety of the public. Furthermore, while a legislature may pass a law to promote health or safety, or may pass a conservation measure, the courts may regard it as a law regulating commerce, as was the case in the Pennsylvania Drug Act and the Louisiana Shrimp and Oyster Acts discussed below.

Health Measures

The most significant of the health measures considered by the Court was the Pennsylvania Drug Act.[17] The State of Pennsylvania passed an act for-

[17] No. 34—*Liggett Company v. Baldridge*, Nov. 19, 1928

bidding anyone but a licensed pharmacist to own a drug store, or to be a partner or a stockholder in any firm owning a retail drug store, except that corporations which already owned drug stores may continue to operate the same, but may not acquire additional stores.

The Liggett Company owned 28 retail drug stores in Pennsylvania, and at the time of the passage of the Act had made arrangements to open additional stores. It brought suit in the United States District Court in Philadelphia to enjoin the enforcement of the law, contending that it was arbitrarily discriminatory and deprived the Company of property without due process of law, and was passed solely for the purpose of suppressing competition between the individually owned and the chain drug stores. The District Court in Pennsylvania denied injunctive relief, but its decision was reversed by the Supreme Court, which held that, in view of the other laws and regulations pertaining to the operation of drug stores, namely, the creation of a Board of Pharmacy, supervision of drug stores, the requirement that each drug store be in charge of a registered pharmacist, etc., there was no reasonable connection between the ownership of stock in a corporation owning a drug store and the purpose of promoting public health and safety.

The New York Law regulating the practice of optometry was sustained.[18] This law prohibits the

[18] No. 667—*Rochen v. Ward;* No. 668—*Kresge Company v. Ward,* April 22, 1929.

sale at retail of spectacles, eye-glasses and lenses, for the correction of vision, unless a licensed physician or optometrist is in charge and is in personal attendance at the place of sale.

William Roschen and the S. S. Kresge Company brought suit in the U. S. District Court in New York to enjoin the enforcement of this law on the ground that it violated the due process clause in the Fourteenth Amendment. They argued that their stores sell only one kind of lenses, namely, magnifying glasses; that these are absolutely harmless; that the mere presence of a physician or optometrist at the place of sale cannot protect the public, because the law requires no examination of the purchaser's vision and that therefore the law was not reasonably calculated to promote the public health and safety. They also maintained that the law was passed at the behest of the Optometry Association of New York and was a scheme to give the members of the Association positions at places where spectacles were sold.

The District Court denied the relief sought, and the complainants appealed directly to the Supreme Court of the United States. Here the State of New York argued that the law was within the police powers of the state and was in line with other legislation regulating the practice of medicine, of nursing, pharmacy, etc.; that the sale of eye-glasses is a matter very directly related to public health; that although preliminary examination is not required

by the attending optometrist or physician, yet his presence there "introduces a tendency upon which the legislature may rely, not unreasonably, to expect that purchasers will be afforded extra and professional guidance in the selection of such aids to vision."

The Supreme Court sustained the argument of the State. Justice Holmes, in delivering the opinion of the Court, said:

> "When the statute requires a physician or optometrist to be in charge at the place of sale and in personal attendance at it, obviously it means in charge of it by reason of and in the exercise of his professional capacity. * * * We agree to all the generalities about not supplying criminal laws with what they omit, but there is no canon against using common sense in construing laws as saying what they obviously mean."

The State of Georgia passed a statute providing that physicians found guilty of a crime involving moral turpitude shall have their licenses revoked. A defendant convicted under this law, appealed his case to the Supreme Court, contending that the law was unconstitutional and void for lack of definiteness, since it failed to define "moral turpitude".[19]

The case was argued in the Supreme Court, but finally dismissed, the Court holding that there was no substantial federal question to consider.

A similar law of Connecticut was before the

[19] No. 110—*Hughes v. State Board of Medical Examiners*, October 29, 1928.

Court.[20] This law provided for the revocation of a physician's license to practice medicine in certain cases. It was contended that the law was invalid because it failed to provide for notice and an opportunity to be heard, but the Supreme Court likewise dismissed the appeal for lack of a substantial federal question.

Safety Measures

The problem of limiting fire hazards brought into question the constitutionality of the ordinance of the City of Marysville, Kansas, forbidding the keeping or storing of gasoline, kerosene, or naphtha, in quantities of ten gallons or more, "otherwise than in tanks, barrels, or other containers, which will be buried at least three feet underground." Two oil companies sought to enjoin the enforcement of this ordinance, claiming that it was unreasonable, arbitrary and oppressive, and violative of the due process clause of the Constitution.[21] The American Petroleum Institute joined in the case, arguing that there were greater fire hazards on account of gasoline stored underground than otherwise. But the Supreme Court held that the ordinance was valid, declaring that "where a legislative action is within the police power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for that of the

[20] No. 438—*Mower v. State Department of Health*, Nov. 26, 1928.

[21] No. 545—*Standard Oil Company et al. v. City of Marysville*, May 20, 1929.

legislative body on which rests the duty and responsibility of decision."

A number of safety measures considered by the Court pertained to the safe operation of railroads, especially those intended for the elimination of grade crossing accidents.

In a case arising out of a grade crossing collision, the Supreme Court upheld the Nashville ordinance requiring railroads to station flagmen at street crossings, where the trains run through the City.[22] The railroad argued that the ordinance was arbitrary, unreasonable, and oppressive, and therefore unconstitutional, because it did not permit the substitution of mechanical or electrical devices. The decision of the Court was based on the proposition that motorists are apt to disregard mechanical signals, whereas they would not be so likely to disregard the warning of the flagmen stationed at the crossings.

On the other hand, the Court held unconstitutional the Georgia law raising a presumption of negligence on the part of railroads for injuries resulting from the operation of their trains, and providing that in actions brought to recover damages for such injuries, the railroads should be held liable, unless they could show that they and their agents had at all times exercised due care.[23] The Court

[22] No. 135—*Nashville, Chattanooga & St. Louis Railway v. White*, Feb. 18, 1929. See p. 43, supra.

[23] No. 519—*Western & Atlantic R. R. Co. v. Henderson*, May 27, 1929. See p. 44, supra.

held that there was no reasonable relation between the presumption of negligence and the facts in the case which came before the Court.

A number of health and safety measures came to the Court in the form of zoning ordinances. The most important of the decisions in this class of legislation was rendered with reference to the zoning ordinance of the City of Seattle.[24] The Court held this ordinance unconstitutional, in so far as it delegated legislative functions to adjoining or neighboring property owners. The ordinance defined the types of buildings which might be erected in the first residential district, and provided that "philanthropic homes for children and for old people shall be permitted in the first residence district when the written consent shall have been obtained of the owners of two-thirds of the property within four hundred feet of the proposed building."

In the case brought before the Court, the trustee of a proposed philanthropic home could not obtain the consent of two-thirds of the adjoining land owners, and there was no evidence that the proposed building in use would be inconsistent with public health, safety, morals or general welfare. In declaring the ordinance invalid, the Court held that "legislatures may not, under the guise of police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities." With reference to

[24] No. 29—*State of Washington et rel. Seattle Title Trust Company v. Roberge, Superintendent*, Nov. 19, 1928.

the specific requirement, the Court held that since the failure to give consent by the adjoining land owners was final, and the land owners were not bound by any official duty, but could withhold their consent for selfish reasons or arbitrarily, the delegation of powers so attempted was repugnant to the due process clause of the Constitution.

The validity of the Zoning Ordinance of New Orleans was upheld by the Court.[25] This ordinance prohibited the erection of business buildings within a prescribed area, but did not prohibit the continuation of businesses already established in that area. An owner of a lot, which he acquired before the enactment of the ordinance, applied to the City Engineer for a building permit to erect a store building. The permit was approved by the Board of Health, and the owner made a contract for the construction of the building. After the construction was begun, the City stopped all work for the reason that the proposed building was prohibited by the Zoning Ordinance. The owner of the property brought the case to the Louisiana Courts, maintaining that the ordinance deprived him of property without due process of law and of the equal protection of law, since the Ordinance permitted established business buildings in the area to remain there. The State Courts sustained the Ordinance, and the Supreme Court affirmed their decision without an opinion.

In all other cases, in which the constitutionality of zoning ordinances was questioned, the Supreme

[25] No. 321—*Sampere v. New Orleans*, March 5, 1929.

Court declined to pass on the controversies. These included the Zoning Ordinance of St. Louis, Missouri, which was attacked by an automobile concern who sought to construct a salesroom for the exhibition of automobiles on its own property.[26] The Company argued that the Ordinance was unreasonable and contrary to the equal protection clause of the Constitution, because many apartment houses and hotels were permitted in the area and many cars were constantly parked in front of such buildings. The Missouri Courts upheld the Ordinance as applied in the case, and the Company brought the case before the Supreme Court. Later, however, the plaintiff company had the case dismissed on its own motion.

In a suit brought to enjoin the enforcement of the Zoning Ordinance of Tulsa, the petitioner raised a question, whether building operations of a non-nuisance type, commenced in good faith before the effective date of the zoning ordinance, were immune from the prohibitory restrictions contained in the ordinance.[27] This was a suit brought in the federal courts to enjoin the enforcement of the ordinance. The lower courts denied the injunctive relief and the Supreme Court declined to disturb their decision.

[26] No. 47—*Oliver Cadillac Company v. Christopher*, October 15, 1928.

[27] No. 564—*DeLano v. City of Tulsa*, Jan. 7, 1929.

Conservation

The power of the states to conserve natural resources came to the Supreme Court in a number of cases, in which the appellants or petitioners maintained that the state laws exceeded the limitations imposed by the Constitution. The Court held invalid the Shrimp and Oyster Acts of the State of Louisiana.[28] These Acts limited the right to catch shrimp or to take oysters in the waters of the State to residents or domestic corporations operating canning or packing factories, drying platforms or shucking plants within the State. A Louisiana corporation which operated a plant for packing shrimp and oysters in Mississippi, and a resident of Mississippi who operated an oyster canning plant in Louisiana, sought to enjoin the enforcement of these Acts, claiming that they were intended, not for the purpose of conservation, but for the purpose of transferring the plants and factories from Mississippi into Louisiana; that as such the Acts were an interference with interstate commerce. Their contention was upheld by the Supreme Court, which held that a state may not, under the guise of conservation, impose burdens on interstate commerce or otherwise invade the constitutional rights of citizens of other states.

The Maryland Oyster Law was likewise before the Court.[29] The State of Maryland required that the

[28] No. 68—*Foster Fountain Packing Co., Inc., et al., v. Hayden et al.*, Oct. 15, 1928.

[29] No. 260—*Leonard et al. v. Earle*, May 13, 1929.

shuckers and packers of oysters shall return to the State, ten per cent of the shells of oysters shucked by them, or the equivalent in money. This law was attacked as imposing a burden on interstate commerce, because some of the oysters shucked in Maryland came from other states. The Supreme Court held that the Act was a reasonable measure in the interest of conservation, and that the fact that some of the oysters shucked came from without the State did not bear such close relation to interstate commerce as to make the law invalid for that reason.

The Game Laws of Texas forbid any person to kill, take or have in his possession, for barter or sale, any wild beaver, wild otter, or wild fox, or the pelts of those animals. A citizen of Texas questioned the constitutionality of the law as applied to one having in his possession, for barter or sale, a wild beaver pelt imported from Mexico into Texas, for sale by him outside the State.[30] He claimed that the Act, as applied, was contrary to the Interstate and Foreign Commerce Clause of the Constitution. The Texas Courts held the law applicable, and the Supreme Court declined to go into the matter.

The Virginia Cedar Rust Law was upheld by the Supreme Court.[31] This Act was passed for the purpose of protecting the apple industry of Virginia, which is the third largest apple producing state in the Union.

30 No. 822—*Urias v. State of Texas*, May 20, 1929.

31 No. 42—*Kelleher v. French*, Oct. 29, 1928.

The law, originally passed by the State of Virginia in 1914, made it unlawful for anyone to keep on his premises any red cedar trees which are infected with the disease known as "cedar rust." It declared such cedar trees, when growing within one mile of an apple orchard, a public nuisance and empowered the State Entomologist to order such trees to be destroyed. The Act also provided that, if in the judgment of the Entomologist, it is practicable to treat any cedar trees, especially ornamental trees, in such a way as to render them harmless, he may direct such treatment to be carried out. The Act further provided that it shall not be enforced in any district until the Board of Supervisors shall adopt it, and such adoption shall not make the Act operative, unless the Circuit Court of the county shall have ratified and approved the action of the Board. In 1920, the Act was amended making the provision applicable to any cedar trees growing within a radius of two miles of an apple orchard.

In this case, the Board of Supervisors adopted the Act of 1916, and the adoption was ratified by the Circuit Court, but after the amendment to the Act was passed, the Board of Supervisors, by resolution in 1923, rescinded their former resolution. The appellant maintained that on account of this action taken by the Board of Supervisors, the Act was no longer applicable in the district. He also claimed that the order of the State Entomologist to remove the cedar trees, was arbitrary and unreasonable,

because the trees could be treated by removing the cedar rust balls. He further maintained that the Act, as applied, deprived him of property without due process of law.

In the previous year a similar case [32] came before the Supreme Court questioning the constitutionality of this Law, and the Supreme Court held that the Law was within the proper exercise of the power of the State to protect its leading industries. In this case, the Court reiterated its former decision.

Laws Regulating Commerce

The Railroad Consolidation Law of Ohio came to the Court on a question whether it was in conflict with the consolidation provisions of the Transportation Act of 1920.[33] The Supreme Court of the State held that the two laws were not in conflict, on the ground that, under the Transportation Act, the Interstate Commerce Commission was not authorized to approve isolated consolidations until a general plan of railroad consolidation had been adopted. The Supreme Court did not pass on the validity of the State law, except to the extent of holding that the consolidation provisions of the Transportation Act had not yet become applicable to cases like the one at bar.

Texas likewise pased an act relating to railroads, which was attacked as unconstitutional in the Su-

32 *Miller v. Schoene*, 276 U. S. 272.

33 No. 82—*Snyder v. New York, Chicago & St. Louis R. R. Co.*, Jan. 2, 1929. See p. 40, supra.

preme Court.[34] This law required that where a Texas corporation takes over the business and properties of an insolvent railroad, it shall also assume the liabilities of its predecessor. In an action brought against the Missouri and Kansas-Texas Railroad Co. upon a judgment previously recovered from its predecessor, the Missouri, Kansas and Texas Railway Company, the Railroad maintained that the above state law was contrary to the provision in the Transportation Act forbidding railroads "to assume any obligation or liability * * * in respect of the securities of any other person * * * even though permitted by the authority creating the carrier corporation, unless and until, and then only, to the extent that * * * the (Interstate Commerce) Commission by order authorizes such * * * assumption." The Texas courts saw no conflict between the state and federal law, and their decision was affirmed by the Supreme Court.

Among the state laws regulating the business of transportation, the Court also had occasion to consider the West Virginia law regulating the granting of franchises for the operation of bus lines.[35] In a contest between an established railroad and a bus line, both of which applied for franchises to operate busses, the highest court of the state, interpreting

[34] No. 88—*Missouri, Kansas, Texas R. R. Co. v. Mars*, Jan. 2, 1929.

[35] No. 55—*State Road Commission of West Virginia et al. v. Monongahela West Penn. Public Service Company et al.*, Oct 29, 1928. See p. 66, supra.

this law, held in favor of the carrier, on the ground that it was the public policy of the state, in granting franchises, to discriminate in favor of existing carriers. The bus line appealed to the Supreme Court maintaining that the law, as interpreted, constituted a denial of equal protection, but the Supreme Court dismissed the appeal for lack of a substantial federal question in the case.

The Supreme Court held invalid the 1925 Amendment to the Oklahoma Cotton Gin Law.[36] This law, which made ginning a public utility, forbade the operation of a cotton gin without a license, which could be obtained only upon a showing of public convenience and necessity. The Amendment of 1925, however, exempted cooperative cotton gins from this requirement of showing convenience and necessity. An individual owner of a cotton gin brought a case to the Supreme Court maintaining that the Amendment violated the equal protection clause in the Fourteenth Amendment, and the Supreme Court upheld his contentions.

Among the insurance statutes passed on by the court were the New York Insurance Law as applied to foreign corporations and the Nebraska statute relating to fire insurance policies. The Superintendent of Insurance of New York ordered a New Jersey insurance corporation to comply with the state law concerning investments of insurance cor-

[36] No. 60—*Frost, etc., v. Corporation Commission of Oklahoma et al.*, Feb. 18, 1929. See p. 67, supra.

porations doing business in the state.[37] This provision required that not more than fifty per cent of the surplus be invested in other insurance companies. The New Jersey Corporation filed suit to enjoin the Superintendent of Insurance from enforcing his order, maintaining that if the New York law is thus applied to foreign insurance companies, and is not limited to the amount of business done in New York, the law is unconstitutional. The District Court in New York denied the injunctive relief, and its decree was affirmed by the Supreme Court without an opinion.

The Nebraska law relating to fire insurance policies provides that, after an insurance company issues a policy, it may not question the value of the property insured, unless the insured wilfully caused the fire in order to collect the insurance. In other words, that the amount of insurance stated in the policy is conclusive evidence as to the value of the property insured. An insurance company maintained that in so far as this law precludes the insurance company from setting up the defense of fraud, namely, that the insured intentionally set a higher value in order to collect a larger amount in case of loss, the act is unconstitutional. The Nebraska Courts held the law valid, and the Supreme Court declined to review the case.[38]

[37] No. 376—*Firemen's Insurance Company of Newark, N. J. v. Conway, Superintendent, etc.*, Jan. 14, 1929. See p. 73, supra.

[38] No. 201—*U. S. Fire Insurance Company of the City of New York v. Sullivan*, Oct. 8, 1928. See p. 83, supra.

The banking law of Georgia was declared unconstitutional, in so far as it provided that the president or director of a bank shall be presumed guilty of fraudulently causing the insolvency of the bank, and in so far as it imposed the burden of proof on him to show that the insolvency was not fraudulently caused.[39] In view of the definitions of insolvency contained in the Act, notably the provision that a bank shall be deemed insolvent if it is not able to meet the demand deposits, and in view of the other provisions in the banking law, permitting banks to lend money up to eighty-five per cent of their deposits, the Court held, there was no reasonable connection between insolvency and the presumption of fraud. For this reason, the Court held that the provision in the Act was without due process.

The Minnesota law enacted for the protection of public funds was questioned.[40] The law provides that in case of insolvency of a depository, the State may proceed, either as a preferred creditor against the assets of the insolvent depository, or against its sureties, or against both, according as the State Board of Deposit may deem advisable. It also provides that in case the State recovers its money from the sureties, the latter shall not be subrogated to the claim of the State against the assets of the insolvent depository as a preferred creditor. The sureties in this case maintained that these provi-

[39] No. 429—*Manley v. Georgia*, Feb. 18, 1929. See p. 91, supra.

[40] No. 498—*Brown et al. v. Commissioner of Banks of Minnesota*, Nov. 26, 1928.

sions were without due process of law. The Supreme Court of Minnesota sustained the law, and on petition to the Supreme Court, the latter refused to go into the matter.

One of the most interesting state statutes declared unconstitutional during the past term was the Tennessee law regulating the price of gasoline.[41] The State established a bureau for the purpose of gathering information concerning the costs of producing and distributing gasoline and other motor fuels, and required the dealers to charge reasonable prices and to abide by those prices. The Court held this price-fixing measure as violating the due process clause of the constitution. The State argued that, should the price-fixing feature of the act be held invalid, the provisions concerning the requirements of information should be upheld. But the Court found that the fixing of prices was the main object of the Act, that the requirement of information was only for the purpose of effecting the main object and therefore must stand or fall with the main object.

General Welfare

The residuum of laws under the police powers, which are not otherwise specifically classified, are loosely designated as laws passed for the "general welfare." Here we find laws for the protection of

[41] No. 64—*Williams, Comm'r. v. Standard Oil Company*, Jan. 2, 1929. See p. 146, supra.

labor, laws against gambling, measures in aid of prohibition, laws for the preservation of peace, etc.

Among the labor laws considered by the Court was the New York Compulsory Continuation School Law.[42] Under this law, every minor between the ages of fourteen and eighteen who is not in full attendance in an authorized day school or who is regularly and lawfully employed, must attend an authorized continuation school during the daytime, for at least four hours a week.

A lad, sixteen years old, was employed in a law office. He left the continuation school, because he claimed that he could not get the academic instruction required to prepare him for the study of law, and because the interruption which such attendance caused, during the daytime, would cost him his job. The father of the boy was tried and convicted for violating the law.

The courts of New York upheld the law as a proper exercise of the police power, and the father brought the case to the Supreme Court, arguing that the measure was neither an educational, health, or a child labor law, and had no reasonable connection with either education, labor, or health. The Supreme Court, however, dismissed the case because it lacked a properly presented federal question.

The Oregon law appropriating $600,000 of the State Industrial Accident Fund for the construction

[42] No. 352—*Braunstein v. New York,* December 10, 1928.

of a public office building, was upheld by the Supreme Court, when it affirmed the decision of the state courts on the question.[43]

In 1927, the Oregon Legislature passed an Act for the construction of an office building for the State, and to invest the state industrial accident fund in it, in an amount not to exceed $600,000. This suit was instituted by three employers of labor, who were contributors to the State Industrial Accident Fund, to enjoin the enforcement of the Act, claiming that the Act abrogated the contract between the State and the employers of labor, that the fund was to be used for a specific purpose, and that by appropriating a portion of the fund for the construction of a public building, the state was taking private property for public use, without just compensation.

The Supreme Court of Oregon held that it was within the police power of the State to invest the fund or any part of it in the construction of an office building, especially since the Act also provided for the payment of interest on the investment, and furthermore, that the fund did not belong to the employers who contributed, but to the State. It also held that the Workmen's Compensation Act, relating to investments of the Industrial Accident Fund, did not constitute a contract between the employers and the State. The Supreme Court sustained this decision without an opinion.

[43] No. 105—*Eastern & Western Lumber Company et al. v. Patterson*, Jan. 14, 1929.

South Carolina passed a law, prohibiting the keeping or operating of any slot machine except those giving definite and certain returns. An action was brought to enjoin the enforcement of this law with reference to slot machines used for the sales of chewing gum and other confections.[44] In the instant case, when a nickel was deposited in the slot, the machine delivered a standard package of chewing gum, having a general and fixed value of five cents. In addition to this, the machine delivered amusement checks and when these checks were deposited in the machine, it exhibited cards, some of which contained written matter purporting to tell fortunes, etc., and others with various scenes. The element of chance in this machine, lay in the fact that the number of amusement checks delivered by the machine varied from two to twenty, depending upon the luck of the purchaser. The injunction was refused in the lower court, and in the Supreme Court the case was dismissed on the ground that there was no substantial federal question presented.

The Supreme Court declined to review a case from the state of Washington involving the validity of the state Prohibition Law.[45] The defendants, who were convicted under the law, claimed that the statute violated the Constitution because, while prohibiting all persons from keeping, selling or transporting liquor, made an exception in favor of preachers, priests and rabbis. The petitioners saw

44 No. 715—*Wilson v. McLane*, April 29, 1929.

45 No. 523—*Kinlund et al. v. State of Washington*, Dec. 3, 1928.

no reasonable connection between the ministerial calling and the dispensation of liquor. The Attorney General of the State argued in opposition, that the petition was frivolous and without merit.

The validity of the Alien Land Law of California was again considered by the Court.[46] This time it appeared on the question whether the Secretary of the State of California may refuse to accept and file a certificate for the incorporation of a Japanese Hospital, if one of the provisions in the certificate stated that the corporation may lease lands on which to erect buildings for hospital purposes. The Supreme Court of California ruled that the refusal by the Secretary of State to accept the certificate was in violation of our treaty between the United States and Japan, and this decision was affirmed by the Supreme Court of the United States. The Court held that as interpreted by the Secretary of State of California, the Alien Land Law would be unconstitutional as being contrary to the treaty of commerce and navigation, for in a broad sense, the organization of a corporation for the purpose of conducting a hospital, constitutes commerce.

The Walker Law of New York, aimed mainly at the activities of the Ku Klux Klan, was sustained by the Supreme Court.[47] This law required all organizations, except labor unions and benevolent associations, to file information with the Secretary of

[46] No. 13—*Jordan v. Tashiro*, Nov. 19, 1928. See p. 243, supra.

[47] No. 2—*People of the State of New York, ex rel. Bryant, v. Zimmerman*, Nov. 19, 1928. See p. 247, supra.

State concerning the membership, constitution, by-laws, oaths, etc., of the organizations. This law was challenged as violating the due process clause of the Constitution, the privileges and immunities clause and the equal protection clause, but the Supreme Court upheld the law as a valid exercise of the police power.

Eminent Domain

The second class of state statutes considered by the Supreme Court were those passed pursuant to the states' powers of eminent domain. Kansas passed a law which provided that all places of historical interest shall be subject to condemnation and shall be taken over by the State under its powers of eminent domain. It was maintained that this statute was unconstitutional, because the taking of property by reason of its historical interest was not a taking of property for public use, but the Supreme Court dismissed the case as raising frivolous questions.[48]

The eminent domain statutes of New York came to the Supreme Court in two cases. The first of these came in connection with the constitutionality of the New York Water Power Act.[49] This Act provided that any corporation which owns a major part of the head and volume of the usable flow of water for power may acquire real property under the exer-

[48] No. 63—*Roe v. Kansas, ex rel. Smith*, Jan. 2, 1929.

[49] No. 504—*People of the State of New York, ex rel. Horton v. Prendergast*, Jan. 7, 1929.

cise of the right of eminent domain, if the Public Service Commission determines that such property is necessary to the full development and utilization of a single undeveloped water power site. The owners, whose property was thus taken, complained that the statute violated the equal protection clause of the Fourteenth Amendment, because it favored the owner of a major part of the usable flow as against the owner of the minor part. The New York courts sustained the Act, holding that the only constitutional limitations on the state's powers of eminent domain were that just compensation be paid for property taken and that the property be taken for public use, but that the equal protection clause was not a limitation on the state's power of eminent domain. On appeal, the Supreme Court declined to take jurisdiction in the case, holding that it involved no substantial Federal question.

The second case which came from New York questioned the validity of the New York law, whereby property may be acquired by the State through entry and taking possession. Under this law, the State enters upon the property, takes possession, files a description of the property with the Secretary of State, and serves notice on the owner. This notice completes the appropriation, title becomes vested in the State, and the owner of the property may bring suit to recover its value in the Court of Claims of New York. The constitutionality of this procedure was questioned in a case where the Long

Island Park Commission acquired certain lands for park purposes.[50] The owner argued that this method does not provide for just compensation, but merely leaves the owner of the property with a moral obligation on the part of the legislature to provide funds, at some future time, out of which to pay for the property, especially since the judgment of the Court of Claims cannot be enforced against the State. The New York Courts upheld the validity of this method of taking of private property, and the Supreme Court denied a writ of *certiorari* in the case.

Incidentally, at the end of the last term, the same question as to the certainty of compensation came to the Supreme Court from the State of North Carolina.[51] Suit was brought in the District Court to enjoin the North Carolina Park Commission from acquiring certain properties, for the reason that the owners could not look with certainty for compensation for their property. The injunctive relief was denied, and the case came on appeal to the Supreme Court, but the appeal was dismissed, because the appellants did not comply with the rules of court as to the printing of the record. In the meantime, another case involving the same question came from New York. In this case the Federal District Court

50 No. 583—*Pauchogue Land Corporation v. Long Island State Park Commission et al.*, Jan. 21, 1929.

51 No. 91—(October Term, 1929)—*Suncrest Lumber Company v. North Carolina Park Commission*, Oct. 7, 1929.

held the New York Act unconstitutional, and that case is likewise now before the Supreme Court.[52]

The Ohio law of eminent domain was attacked in a case involving the question whether covenants running with the land, restricting the use of it for single, private family residence purposes only, and not for the purpose of any trade or business, were binding on a railroad company having the power of eminent domain.[53] The Supreme Court of Ohio held that the railroad which acquired the property was not bound by the restrictive covenants. The case was brought to the Supreme Court on the question whether the law, as interpreted, was contrary to the equal protection clause and to the contract clause of the Constitution, but the Court declined to take jurisdiction, holding that the case involved no substantial federal question.

Taxation

The third class of statutes, whose validity was considered by the Court, came under the states' power to tax. These may be roughly divided into excise taxes, property taxes and measures passed in aid of the general taxing powers. Among the excise taxes were franchise taxes on corporations, on the sale or use of various types of commodities, and on the right to inherit property.

[52] No. 336—(October Term, 1929)—*White v. Sparkill Realty Corporation.* (Case still pending).

[53] No. 426—*Gale et al. v. Norfolk and Western Railway Co. et al.*, Dec. 3, 1928.

Of the statutes imposing taxes on corporations, that which evoked the greatest amount of concern on the part of the states, was the Massachusetts tax on domestic corporations.[54] This franchise tax was based on the net income of corporations, and net income was so defined as to include income from federal tax-exempt securities.

The Massachusetts courts sustained the constitutionality of the Act, holding that the tax was not imposed on the items of income from government securities, but was an excise tax on the corporation's right to do business. But its decision was reversed by the Supreme Court. It held that the tax as imposed, though based on the *net* income of the corporation, was a burden on Federal tax-exempt securities and was therefore unconstitutional.

The Supreme Court also invalidated the foreign corporation franchise taxes imposed by the State of Washington, in so far as the taxes were based on the entire authorized capital stock of the corporation, regardless of the amount of stock actually issued.[55] In a suit brought by a foreign corporation doing business in the state, the State argued that the Act was not unconstitutional, because it was within the proper taxing power of the State to impose a fee for the privilege of doing business in the state and because a reasonable limit of $3,000 was

[54] No. 578—*Macallen Company v. Massachusetts*, May 27, 1929. See p. 112, supra.

[55] No. 278—*Cudahy Packing Company v. Hinkle, Secretary*, Feb. 18, 1929. See p. 129, supra.

set to the amount of the fee which may be required from foreign corporations.

But the Supreme Court held the tax a burden on interstate commerce and therefore repugnant to the Federal Constitution, notwithstanding the fact that the statute set a maximum limit on the amount to be paid.

On the other hand, the Court upheld the New York corporation tax imposed on foreign corporations,[56] and a similar tax imposed by the state of Missouri.[57] The laws of these states taxed the foreign corporations on the basis of their outstanding capital stock employed in the state. The par value stock was taxed on the basis of their par, while the non-par value stock in Missouri was taxed at a value of one hundred dollars per share and under the New York law, each share of non-par stock was taxed at six cents. The corporations maintained that these laws were unconstitutional, because they unduly discriminated among the various corporations belonging to the same class, since their non-par value stock did not have the same value. The Supreme Court, however, held that the distinction between par and non-par stock for purposes of taxation was reasonable and that the statute did not contravene the equal protection clause of the Constitution.

[56] No. 601—*People of New York v. Latrobe, Jr., et al.*, May 13, 1929. See p. 130, supra.

[57] No. 579—*International Shoe Company v. Shartel*, May 13, 1929. See p. 130, supra.

The court also considered the validity of the Missouri Franchise Tax on domestic corporations which was based on the par value of outstanding capital stock employed in the state, as applied to interstate carriers.[58] The railroad maintained that in determining the amount of capital stock employed in the state, the liabilities of the railroad must be deducted from the amount of property the corporation used in the state, and that otherwise the tax is a burden on interstate commerce. The Supreme Court of Missouri upheld the validity of the tax, and the Supreme Court declined to review the case.

The State of Tennesse imposed a franchise tax based on the net income of all corporations whose income was derived from business done entirely within the state. A company engaged in kiln drying, resawing and resurfacing lumber, shipped to it from outside the state and consigned to purchasers likewise outside the state, claimed that the excise tax imposed on it by the state of Tennessee constituted a burden on interstate commerce. It argued that its manufacture took place while the goods were still in transit, but the Supreme Court dismissed the appeal for lack of jurisdiction.[59]

The largest group of excise taxes imposed on sales of commodities were taxes on gasoline and other petroleum products. The Texas Gasoline tax was

58 No. 360—*Missouri ex rel. Missouri Pacific Railway Co. v. The State Tax Commission*, Oct. 22, 1928. See p. 131.

59 No. 230—*Jorgensen-Bennett Manufacturing Company v. Knight, Sheriff*, Jan. 21, 1929. See p. 122, supra.

held unconstitutional in so far as it was made applicable to gasoline sold to the federal government.[60] The Kentucky tax imposed on the amount of gasoline used in the state was held unconstitutional, in so far as it was applied to gasoline used by a ferry boat plying between Kentucky and Illinois.[61] The Louisiana tax on the average amount of oil stored in tanks awaiting to be exported was held invalid as a tax on exports.[62]

But the Court upheld the constitutionality of the Montana tax on gasoline.[63] Under its Gasoline Tax Act of 1925 the state of Montana required that every dealer of gasoline shall pay a license tax of two cents for each gallon of gasoline sold. The Act defined "dealer" as including every person and corporation engaged in the business of distributing and selling gasoline within the state. A Montana corporation engaged in this business maintained that the Act was unconstitutional, because it discriminated against the domestic product, in favor of gasoline imported from other states. For under the law, the gasoline imported into Montana and *used* in the state, was not subject to the tax, unless it was *sold* within the state. The Supreme Court held, however, that the law was not contrary to the

[60] No. 147—*Grayburg Oil Company v. State of Texas*, Jan. 21, 1929. See p. 115, supra.

[61] No. 296—*Helson et al. v. Commonwealth of Kentucky*, April 8, 1929. See p. 118, supra.

[62] No. 306—*Carson Petroleum Company v. Vial*, April 8, 1929. See p. 116, supra.

[63] No. 210—*Hart Refineries v. Harmon*, Feb. 18, 1929.

equal protection clause. The Court distinguished between a franchise tax based on sale of gasoline and one based on the use of gasoline, and held that the state of Montana had the right to tax either the former or the latter.

Inheritance Laws

The outstanding inheritance tax case decided during the term, involved the constitutionality of the New York Transfer Law, as applied to vested and contingent remainders. Under this law, life estates and contingent remainders are taxed in accordance with their value as of the death of the testator. The tax on contingent remainders is measured by the value of the estate transferred at the time of the testator's death; the tax is not payable until the death of the life tenant; but the executor must furnish cash or security for the tax. The amount of cash or security is fixed by a temporary taxing order.

In an appeal from the New York courts,[64] it was argued that this tax on contingent remainders resulted in a tax on a greater amount of property than the value of the estate, which is not due process; also that the law violated the equal protection clause in that it discriminated between contingent and vested remainders, taxing the latter on their actual values, while taxing the former on the entire value of the estate without deducting the intervening

[64] No. 79—*Salomon et al v. State Tax Commission of New York*, Feb. 18, 1929. See p. 122, supra.

vested or life estates. These contentions, however, were overruled by the Supreme Court, which held the law valid.

The Virginia Transfer Law also came to the Court last term.[65] The state courts held that the law violated the equal privileges and immunities clause of the Constitution, in that it discriminated between estates of resident and non-resident decedents, imposing a graduated tax with exemptions on the former and a flat rate tax without exemptions on the latter. The taxing authorities of the State petitioned the Supreme Court to review the case, but the Court declined to do so. In the preceding term of Court,[66] the Supreme Court declined to review a decision of the Court of Appeals of New York which held a similar provision in the New York Estate Tax Law unconstitutional.

A similar question arose with reference to the Inheritance Tax Law of Iowa, which taxed estates of residents or citizens on a graduated scale based on exemptions. The tax on non-resident aliens was at a higher rate and allowed no exemptions. The executor of a Danish subject maintained that the tax was contrary to our Treaty with Denmark. The Iowa courts held against him, but their decision was reversed by the Supreme Court which held that the Treaty must be liberally interpreted.[67]

[65] No. 871—*Commonwealth of Virginia v. Marshall and Illsley Bank*, May 20, 1929. See p. 126, supra.

[66] *Loughman v. Smith*, 275 U. S. 560.

[67] No. 115—*Nielsen v. Johnson*, Feb. 18, 1929. See p. 125, supra.

The validity of two inheritance tax laws was questioned in so far as they imposed the burden of proof on the beneficiaries to show that the gifts received by them were not made in contemplation of death.

Under the law of Ohio, if a gift is made within two years before the donor's death, the presumption is that the gift was made in contemplation of death, and the amount is included in computing the inheritance tax. Under the law of Wisconsin, gifts made within six years were conclusively presumed to have been made in contemplation of death. The Ohio case came up on appeal, which, however was dismissed for lack of a substantial federal question.[68] The Wisconsin case came on a preliminary application to review the decision of the state courts, upholding this provision, but the Supreme Court declined to go into the matter, because in this case the judgment of the state courts was based on a non-federal ground.[69]

Property Taxes

Gross receipts taxes imposed by states on corporations, especially on public utilities, are sometimes regarded as franchise taxes, and sometimes as property taxes. The gross receipts tax imposed by the State of Minnesota on carriers has been held to be a property tax, hence it is properly under this classification.

[68] No. 52—*Parker v. Tax Commission of Ohio*, Nov. 19, 1928. See p. 127, supra.

[69] *Beck et al. v. Milwaukee County, Wisc. et al.*, Oct. 22, 1928. See p. 127, supra.

The Minnesota gross receipts tax on interstate railroads was attacked as imposing a burden on interstate carriers.[70] This tax was imposed on the ratio of the earnings from interstate operations which the mileage in Minnesota bore to the entire mileage over which the business was done. The Minnesota courts held that "gross receipts" included the amount which the railroad had to pay for docking services outside the state, and this was affirmed by the Supreme Court.

This year the Court reiterated its holding that Virginia may not impose a personal property tax on trust property held outside the state by a non-resident for the benefit of residents of Virginia. In this case, the person who left the property in trust and the trustee were both non-residents, the property never came into the state, and the tax was imposed not on the resident's beneficial life interest in the property, but on the trust property itself. This, the Court held, the State could not do.[71]

Most of the statutes imposing taxes on property were questioned on the ground of some irregularity in the issue of bonds securing the contracts entered into for the construction of roads, bridges, drainage improvements, etc. The Mississippi Acreage Tax was attacked as invalid, because the petition for the bond issue had not been signed by the statutory majority, and the question arose whether a subsequent

[70] No. 106—*Great Northern Railway Co. v. State of Minnesota*, Feb. 18, 1929. See p. 119, supra.

[71] No. 38—*Crane v. Virginia*, Oct. 22, 1928. See p. 132, supra.

act of the Legislature validating the bond issue was sufficient, but the Supreme Court dismissed the appeal [72] because the judgment of the state court was based on a non-federal ground.

A road construction statute of Ohio provided that the Board of County Commissioners may, by unanimous resolution, increase the percentage of cost and expense of the improvement to be specially assessed, and may order that all, or any part of the costs and expense of the improvement contributed by the county and the interested township be assessed against the property abutting on the improvement. The appellant contended that this law was unconstitutional, because it delegated legislative powers to the Commissioners, and deprived the taxpayers of property without due process of law.[73] This case was likewise dismissed for lack of a substantial federal question.

The same fate followed an appeal from the Court of Appeals of Maryland, questioning the constitutionality of a statute which ratified and confirmed certain additional assessments levied by the Commissioners of a sanitary district in the state, without giving sufficient notice or hearing to the property owners.[74] These assessments in question had

[72] No. 295—*Norman Breaux Lumber Company v. Reed, Tax Collector*, Oct. 8, 1928.

[73] No. 474—*Theobald et al. v. Board of County Commissioners of Fayette County*, Dec. 3, 1928.

[74] No. 492—*Noel v. Washington Suburban Sanitary Commission*, Dec. 3, 1928.

been declared invalid by the Maryland courts, whereupon the legislature passed this validating act. The appellant maintained that the act was invalid, because it amounted to a reversal of the decision of the courts; in other words, that the legislature usurped the powers of the judiciary. The Maryland courts sustained the validity of the curative legislation and of the assessments levied thereunder, and the Supreme Court dismissed the case for lack of a substantial federal question.

Laws in Aid of Taxing Powers

One important statute considered by the Court was enacted by a state for the collection of back taxes. Arkansas passed an Act authorizing and directing the Attorney General of the State to institute proceedings to collect back taxes due from corporations. The question arose whether this was an arbitrary discrimination against corporations, contrary to the equal protection clause of the Constitution, since the law was directed against corporations, and not against individuals from whom back taxes were due.[75]

A corporation against which suit was brought to recover back taxes relied, in its argument, on the case of *Quaker Cab Co.* v. *Pennsylvania,*[76] in which the Supreme Court recently held invalid a tax arbitrarily directed against corporations engaged in the

[75] No. 101—*White River Lumber Company v. Arkansas ex rel. Applegate,* May 27, 1929.

[76] *Quaker City Cab Company v. Pennsylvania,* 277 U. S. 389.

transportation of passengers and freight. In that case the Court held that such a tax on corporations, but not on individuals or partnerships, constituted an arbitrary and unreasonable discrimination.

The validity of the Arkansas Back Tax Law was upheld by the Court, on the theory that there is a difference between discriminatory legislation imposing taxes and laws passed for the enforcement or collection of taxes already due. The dissenting opinion in the case, delivered by Mr. Justice Butler, was based on the proposition that the equal protection clause applies to the enforcement of laws as well as the making of laws.

Another act of Arkansas, which was also a measure in aid of the states' powers of taxation, was held unconstitutional as applied in the particular case.[77] The statute of Arkansas imposed a penalty of 25 per cent for delinquency in the payment of taxes. In 1922, the "quorum court" of Savier County, Arkansas, levied a three mill road tax upon the real and personal property of certain railroads. These contended that the tax was invalid, because the county tax commissioners did not comply with the requirements relating to the voting of the road tax. The Railroads sought to enjoin the collection of the tax, and the trial court issued an injunction, but was reversed by the Supreme Court of Arkansas.

[77] No. 43—*Kansas City Southern Railway Company v. Hooper*, Oct. 29, 1928.

This suit was then brought by the Tax Collector to recover the tax and the penalty. The Railroads contended that the penalty should not be collected, because the delay was bona fide, and that if collected, it would amount to a penalty for seeking to protect one's constitutional rights. The Tax Collector maintained, in opposition, that the Railroads had a full and adequate remedy by paying the tax and suing to recover the same, and that therefore they were not entitled to this defense against the collection of the penalties.

The Supreme Court of Arkansas sustained the contentions of the Tax Collector, but its decision was reversed by the Supreme Court without an opinion.

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